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VERSUS Connolly, Michael J., et al.

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NO._____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1984

ALWIN E. HOPFMANN, GREGORY HESSION,
CLARENCE PERKINS, CLARENCE PAULIN,
and BETH SULLIVAN,

Appellants,

v.

MICHAEL JOSEPH CONNOLLY,
FRANCIS X. BELLOTTI, CHESTER G. ATKINS,
and THE DEMOCRATIC STATE COMMITTEE OF
MASSACHUSETTS,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

Jurisdictional Statement

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QUESTIONS PRESENTED

1. Is the unanimous decision of this Court in Smiley v Holm, 285 US 355 (1932, opinion by Mr. Chief Justice Hughes,) overruled?

2. Where a state legislature passes a law revoking authority previously delegated to political parties to hold a pre-primary convention and endorse a candidate for United States senator, who thereby becomes entitled to ballot access at the ensuing primary, may a small group of the members of the political party nonetheless exercise a right of Freedom of Association emanating from the First Amendment, following the ruling of this Court in Democratic Party of U.S. v

Wisconsin, 450 US 107, and pre-empt and nullify that revocation so as to re-establish, against the desires of the legislature, that pre-primary convention and give it powers to exclude otherwise qualified candidates from the ballot in the manner of the "Jaybird" primary in Terry v Adams, 345 US 461?

3. Does the right of Freedom of Association, emanating from the First Amendment, empower a small inner group of a particular association, in this case, a political party, to enforce a claimed right which is not the right of every member of that association or a corresponding right of each member individually, but is rather the right of

that small, inner group to increase its own power at the expense of diminishing the power of the broad membership, contrary to the holdings of this Court in NAACP v Alabama, 357 US 449, and similar cases, with regard to primary elections, a "state function," under the ruling of Smith v Allwright, 321 US 649?

4. Is a State statutory scheme which prescribes a method of primary ballot access in exclusive language pre-empted, under the ruling of this Court in Malone v White Motor Corp., 435 US 497, by a right of Freedom of Association in an inner group of a political party which, allegedly under the authority of Democratic Party of the U.S. v Wisconsin

supra, allows that group to make private rules which then become laws and are added to the state laws to require their plain meaning to be radically changed?

5. Where a legislature, acting pursuant to Art.I,Sec.4,Cl.1, as explicated in Smiley v Holm,supra, makes the place of selection of party nominees for U.S senator the polling places of a statewide primary, may an inner group of a political party, acting pursuant to a right of Freedom of Association, pre-empt those provisions of the State statutory scheme making the polling place the place of electing U.S. senators and make instead the pre-primary convention the place of their election, particularly where,

as here, all candidates save one are eliminated at the convention?

6. Does the pre-emption of state statutes and their provisions in this case violate the rights of plaintiffs-appellants under Art.I, Sec.3, Cl.3, and 42 U.S.C. 1983?

7. Does the pre-emption of state statutes in this case by a privately made law violate appellants' rights under Art.I,Sec.3,Cl.3, and 42 U.S.C. 1983?

8. Does the pre-emption of state statutes in this case by a law made by a party inner group violate appellants' rights under the Equality Clause of the XIVth Amendment by weighting voting in favor of a party elite?

9. Does the pre-emption of the state statutes here violate the right of the plaintiffs, under the XVIIth Amendment, to have senators chosen by the people?

10. Does the pre-emption of state statutes by a private-rule-as-law here violate plaintiffs-appellants rights under the First Amendment to political expression?

NO._____

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746 F2d 97, (1st Circ. 1984).

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) THE NATURE OF THE PROCEEDING AND THE STATUTORY BASIS FOR THE FEDERAL JURISDICTION

(A) The Nature of the Proceeding

This proceeding was filed in the district court as a suit to enforce an exclusive State statutory scheme which provides access to the primary ballot in Massachusetts for the candidates of all political parties. The plaintiffs, now appellants, are: an individual who was a candidate for his party's nomination for the U. S. senate in 1982 and 4 rank-and-file members of the same state party,, the

democratic, who wished to vote for him, ("Hopfmann"). The defendants are: the then chairman of the democratic state committee, the Secretary of State, who was responsible for placing names on the ballot, the Attorney General, who had responsibility for enforcing voting laws and the Constitution, and the central committee of the state party. The chairman of the state committee and the state committee are defendants because it was their enforcing of a "party rule," which the legislature had repudiated, that led to Hopfmann's being kept off the ballot so that the 4 voters could vote for him only under that burden. This private party rule, the "15 Percent rule," imposes

a requirement for ballot access which is different from, and in addition to, the requirements stated in the statutes.

Though the State statutory scheme for ballot access is exclusive in language, the contention of defendants throughout has been that the Statutory scheme does not prevent an inner group of the party from imposing an additional primary ballot access requirement. The defendants-appellees, ("the Commitee,") have argued that this additional requirement is either "added to" or "incorporated" into the statutory law "as though" it were part of the statutes. This is so, the Committee have argued because of a right of "Freedom of Association" emanating from the First

Amendment and residing in the party.

The principal requirement of the statutory scheme for primary ballot access is the collection of signatures of a specified number of registered voters, who may be of any party affiliation or even independent. In the case of a party's nomination for U. S. Senator the number of signatures required is 10,000. The 15 percent rule of the Committee requires, in addition to the statutory requirements, that the candidate attend a convention of 1/2 of 1% of the party members. The delegates at this convention are selected by caucuses which are participated in by 7.6% of the enrolled members. The rule

requires the candidate, in order to be allowed on the ballot at the fall primary, to be the endorsee of the convention, or receive the votes of at least 15 percent of the convention delegates. The Committee have argued throughout that this convention vote requirement is necessary in order that those who are involved in the convention and caucuses might have control over who party's candidates will be. In the appeals court opinion, the appeals court itself, in affirming the dismissal by the district court, brought a new argument into the case which has changed its nature. The court held that the party had authority delegated to it from the legislature to promulgate and

implement the 15 percent rule. It had been pointed out in the agreed upon facts below that the legislature had, in 1973, revoked the authority for parties to hold pre-primary endorsing conventions, an authority which had been authorized in 1962 as supplemental to the method of collecting signatures. The Committee had never argued that any such delegation existed. Yet the opinion below is based squarely on a "delegation" of power.

Plaintiffs/appellants, as required by the line of cases in the 5th circuit on elections of doubtful constitutionality, Hamer v. Campbell, 358 F2d 215, et al., attempted several times to obtain preliminary relief before the statewide

primary, held on September 14, 1982. These attempts were unsuccessful. Between the primary and general elections, the plaintiffs attempted again to obtain relief, also without success. Accordingly, Hopfmann then began, under the "necessary and further relief" clause in the complaint, to seek the setting aside of the election. This has changed the nature of the case in that it has introduced the question of whether this relief should be applied. Plaintiffs also seek damages.

(B) The Statutory Basis for the Federal Jurisdiction

United States Senate races are federal matters from start to finish,

regulated by the prescription of the legislatures of the states as delegated in Art.I,Sec.4,Cl.1,(The Times, Places and Manner Clause). The prescription of state legislatures for the times, places and manner of electing U.S. senators is pursuant to delegated federal authority. The statutes passed under this authority are, coincidentally, both state and federal law. In this case the state statutes involved, as they affect the Senate race, are both.

Hence, if the decision that there is "delegated" authority within the inner group of the state party to pass rules which can be added to the laws is correct, the 15 percent rule is state and federal

law. Its validity is a federal question. If the rule is not part of the times, places and manner of electing a U.S. senator, then the only thing it could be is a qualification under Art.I,Sec.3,Cl.3 the "Qualifications Clause" for senators. That it must be one or the other creates federal jurisdiction, not only over the rule, but also over that into which it is allegedly incorporated, the state statutes.

The XVIIth Amendment requires that the election of senators be "by the people" of each state and that the electors have the qualifications requisite for the electors of the most numerous branch of the state's legislature.

This creates a standard for regulating senatorial elections pursuant to Art.I,Sec.4, one which was not adhered to in this instance and which creates additional jurisdiction. The authority of the state under the times, places and manner clause cannot be used to create qualifications for senatorial electors which are greater than those imposed upon the electors for the lower house of the legislature. Yet here it was neccesary to be a conventioneer in order to have a vote, something not required of voters to vote for many members of the most numerous branch. This presents federal questions.

The Committee has defended its 15 percent rule, and all of the actions

pursuant to it, as empowered by the Freedom of Association. The state court proceedings upon which the Committee relies so heavily, rely upon that right. Hopfmann and his voters claim that their intertwined rights of political expression under the 1st Amendment have been violated by the rule. The parties make claims under the XIVth Amendment. Plaintiffs have asked judgment and damages under 42 U.S.C.1983 for all constitutional and federal statutory violations. The appeals court, by finding "delegation," raised a new federal issue that adds additional jurisdictional grounds: Was 28 U.S.C.1652, adhered to?

(ii) DATES BELOW

Date of entry of the order was Oct. 22,1984. Rehearing denied Dec. 10,1984. Notice of appeal filed March 8, 1985, in First Circuit in Boston.

(iii) THE STATUTORY PROVISION BELIEVED TO CONFER JURISDICTION ON THIS COURT is 28 U.S.C. 1254(2).

The court of appeals' holding pre-empts certain provisions of the statutes of Massachusetts as repugnant to the Constitution. Therefore, under the rulings of this Court, they have been found invalid. It is asserted thac the First Amendment "Freedom of Association" inheres in an inner group of a party and creates a "delegation" of authority from

the legislature to that party group. The authority "delegated" is the power to make private rules that then can be added to state election laws and become public laws though not in any statute. What makes this so unusual is that the legislature itself has on more than one occasion refused to enact such a "delegation" as the appeals court has found. In 1982 the legislature passed a bill, which died by pocket veto, specifically repudiating the authority which the party group here claims and reiterating the exclusivity of the State statutory scheme. This private lawmaking authority, then, rests solely upon the asserted federal constitutional right.

The court of appeals' finding of this unusual federal right thus pre-empts certain provisions of the State statutes in the manner discussed by this Court in Malone v. White Motor Corp., 435 U.S. 497, (1978), and by the 8th Circuit in that case, 545 F2d 599 (1976).

As thus construed, this right is not exercised by the total membership of the state party, or anything close to it. It is the right of an inner group of the party, 7.6% of the regular enrolled membership, to choose in caucuses a still smaller group, about 1/2 of 1% of the party's members, which then delegates this lawmaking authority to itself, sans benefit of legislation and in defiance of

the legislature. The party elite is arrogating power to itself which is tantamount to public lawmaking authority and the appeals court is calling it a delegation, is what it amounts to. Therefore, it goes far beyond the "Freedom of Association" as found by this Court in NAACP v Alabama, 357 US 449, and the NAACP and other leading cases on Freedom of Association. Because in those cases the organization is found to be "the apropriate party to assert these rights, because it and its members are in every practical sense identical." ibid, 459. In that case it was found that any person who was in accordance with the principles and policies of the organization could become

a member, and that the state NAACP was the medium "through which its individual members seek to make more effective the expression of their own views." loc. cit.

It is extremely important, before an organization can assert the right of Freedom of Association on behalf of its members that its "aims and interests" not be "shown to conflict with those of its members and nonmember[s of a similar class.]" NAACP v Button, 371 US 415, 443. Yet this is what we have in the present instance. A small inner group is asserting a right to promote its own interests, in the name of the organization, at the expense of the interests of the broad class of all the

members of the organization in maintaining effective and equal participation in the candidate selection process, and also at the expense of those non-members who join the party at the primary as they are allowed to do by state law. See also Harrison v NAACP, 360 US 167, 177. What the organization claiming the right of Freedom of Association must assert is the "corresponding" right of each and every member. NAACP v Button, 371 US 415, at 429; Bates v City of Little Rock, 361 US 516, 523, n. 9; Louisiana ex rel. Gremillion v. NAACP, 366 US 293, 296.

There is nothing in the concept of Freedom of Association, as developed, that indicates that the concept was meant to be

used to justify private lawmaking by a party elite which would diminish in any way the rights of the party's broad membership. The defendant-appellee State Committee is not representing the interests of all of the enrolled "regular" members of the state democratic party, as indeed it cannot. It has made no claim that all of the regular members of the party whose interests it seeks to use for justification of its positions are uniquely or even predominantly injured by the enforcement of the State statutory scheme for ballot access without the party rule. Ripon Society v National Republican Party, 525 F2d 567 (1975).

All of the foregoing directly affects

the question of whether there is a right of appeal under 28 U.S.C. 1254 (2) in this case. Although it appears that an appeal is mandatory anyway because of the specific statutory revocation of such delegated authority in 1973.

This court found in Malone that in such a "pre-emption" case the question of whether the state statutes in question are invalid under the Supremacy Clause depends upon the intent of the body originating the federal law or policy whose pre-emptiveness is at issue. ibid., at 504. In Malone, what was at issue was the supremacy of the National Labor Relations Act over a state statute regulating pension funds. "It is uncontested...that

whether the...statute is invalid depends on the intent of Congress. 'The purpose of Congress is the ultimate touchstone.' Retail Clerks v Schermerhorn, 375 U.S. 96, 103." Federal "courts normally sustain local regulation of the same subject matter unless it conflicts with or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States." loc. cit.

In the instant case, the pre-emption is by virtue of the party group's having promulgated a rule which then, because of its claimed Freedom of Association, is added to the Massachusetts election laws

and becomes a public law as well. Hence, whether there is pre-emption must be ascertained by examining the intent of the promulgators of the party rule. For their authority to add to the state statutory scheme is a federal power. The private rule is, therefore, a federal scheme of law. Where it conflicts with the state statutes, under the Supremacy Clause the state scheme must give way. Under Malone there is pre-emption lest the State statutory scheme "frustrate the federal scheme," of the party rule.

Under Malone it is also necessary to examine the totality of the circumstances surrounding the interaction between the federal and state schemes. That the

totality of the circumstances need be examined is especially important here because the state statutes in question are also themselves federal law, under the delegation to state legislatures contained in Art.I,Sec.4,Cl.1. The State statutory scheme for elections is a "prescription" of a state legislature pursuant to that clause. Oregon v. Mitchell, 400 U.S. 112, at 120, 121 (Opinion of Black, J.); United States v. Classic, 313 U.S. 299, at 315 (1941); Ex Parte Siebold, 100 U.S. 371 (1880); Ex Parte Yarbrough, 110 U.S. 651 (1884); Swafford v. Templeton, 185 U.S. 487 (1902); Wiley v. Sinkler, 179 U.S. 58 (1900), The "delegation" which the court of appeals found, on the other

hand, is not such a prescription. Because it is not an "exercise of the authority," of the legislature "in accordance with the method which the State has prescribed for legislative enactments" Smiley v. Holm, 285 U.S. 355 (1932), (Unanimous opinion by Mr. Chief Justice Hughes).

Because this state statutory scheme is delegated federal law, a federal court is obliged to examine it afresh to determime jurisdiction under 28 U.S.C. 1254 (2) as well as for the merits, and see that it complies with the rule laid down in Smiley v. Holm. The defendants-appellees have been anxious throughout this litigation to obfuscate this important truth. Their strategy seems to

be one of claiming an inherent federal right that interacts with another important federal legal scheme, i,e., that by which Congress is elected, and then claiming that the entire matter is disposed of in their favor by a state court decision which involved non-federal candidates. To this they add that a refusal by this court to review that state court decision in Langone v. Connolly, 103 S.Ct. 1510, (dissent by Stevens, Rehnquist and O'Connor) somehow resolves the questions raised in this case. So far they have found this argument pursuasive.

Although the plaintiffs-appellees have advanced Smiley arguments, the lower courts have avoided Smiley: The district court held the Art.I,Sec.4,Cl.1 issue had been disposed of by this Court's two rejections of single justice relief of a preliminary nature. (Under the doctrine of Hamer v. Campbell, 358 F.2d 215, (5th Circ. 1966), and the Deep South unconstitutional election cases, those victimized must timely seek concurrent relief or waive their right to later remedies. Bell v. Southwell, 376 F2d 659(1967), State of Alabama v. U.S., 304 F2d 583(1962)). The court of appeals held the Art.I, Sec.4, Cl.1, claims disposed of because of the legislatures' power to delegate part of

their election law authority to political parties. No delegation of power had been raised by either side up to that point. But it avoided the question of whether the delegation upon which it based its decision in any way complied with Art.I, Sec.4,Cl.1. No Massachusetts court has found such a delegation. The state courts have only found that the state statutes must be bent to "accomodate" the claimed federal right of the party inner group to add its private rules to the laws. Thus, there is no interpretation of the state law by the state's courts which supports the finding of the court of appeals. That finding rests entirely upon the federal constitutional "Freedom of Association."

What we have here is a sub rosa attempt to overturn Smiley v. Holm.

For purposes of establishing that there is jurisdiction under 28 U.S.C. 1254 (2) here, it is important to correct this obfuscation and error. Granting arguendo, for purposes of the jurisdictional argument, without acknowledging its correctness on the merits, the assertion of the court of appeals that such a "delegation" exists, it does not remove either the "delegation", or the private rule that is ostensibly "added to" the election laws of Massachusetts from having to meet the test of Smiley v. Holm, or from having to be examined independently as part of delegated federal law by this

Court for purposes of settling the jurisdictional,or any other, question.

There are no state court decisions interpreting the Massachusetts statutory scheme which support even the theory that was argued, that the State scheme can be bent to "accomodate" the asserted federal right, except Langone v. Secretary of the Commonwealth, 446 N.E. 2d 43 (Mass. 1983). Langone is based entirely on bending the language of the state statutory scheme to accomodate the alleged lawmaking power of the party inner group under its right of Freedom of Association, as a reading of that decision will clearly reveal. Unless both the delegation of the lawmaking power from the legislature to

the party and the exercise of the lawmaking power by the party inner group meet the test of Smiley v. Holm, however, the state statutes in question here must be read in the absence of the bending of them which was done by the Langone court to accomodate the allegedly "delegated" federal scheme created by the party group in its private rule.

The right of Freedom of Association is not stated in the First Amendment. It is a broad and vaguer right "emanating" from the First amendment as derived by this Court late in the day. Regardless of the overall validity and utility of such a derivative right, where it is in conflict with specific language of the Constitution

as actually written, such as that of Art.I, Sec.4, cl.1, then the vaguer right must give way, not the specific right. For the courts are bound to harmonize constitutional provisions, not seek to upset specific provisions of the Constitution. Rhode Island v. Massachusetts, 12 Pet 657. No constitutional guaranty enjoys preference and none should suffer subordination or deletion. Ullman v United States, 350 US 422. A construction nullifying a specific clause will not be given to a Constitution. Marbury v. Madison, 1 Cranch 137. No constitutional principle should be so enforced as to substantially impair another. Dick v United States, 208 US 340. The Consti-

tution is not self-destructive; in other words, the powers which it confers on the one hand it does not then take away. An authority given in express terms is not limited or restricted by subsequent provisions in the Constitution or its Amendments. Billings v. United States, 232 US 261. Qualifications of express provisions are not to be inferred. Richfield Oil Corp. v State Board of Equalization,329 US 69.

To the extent that the "delegated" authority to the state party from the legislature, which the court of appeals found, is state law "added to" the state statutes, this Court is the final arbiter of whether that delegation is a

permissible limitation upon the specific mandate of a clause such as the Times, Places and Manners Clause. Milwaukee County v White Co., 296 US 268; Williams v North Carolina, 317 US 287. The decisions of state courts are not authority binding upon the courts of the United States, even sitting in the same state, where the the questions involved and decided relate to rights arising under the Constitution of the United States. Crescent City L. S. & S. H. Co. v Butchers' Union S. H. & L. S. L. Co., 120 US 141. A Federal court is not concluded by a state court's determination of a right claimed under a Federal statute. Boyd v Nebraska, 143 US 135. Federal statutes, even when they are

delegated ones, must be interpreted by the Federal courts independently of local considerations, and cannot be said to have an established meaning, whatever the decisions of other courts may have been, until they are construed by the Supreme Court of the United States. Calhoun Gold Min. Co. v Ajax Gold Min. Co., 182 US 499. Even where the content of a federal right is determined by a state, its scope is a federal question. De Sylva v Ballentine, 351 US 570.

If then, the bending of the state statutory scheme by the state court in Langone is disregarded, as properly it must be by this Court, it can be seen that under the Rules of Decision Statute, 28

U.S.C. 1652, this Court and the lower courts are required to regard the State statutory scheme of laws regulating primary ballot access as written as rules of decision binding upon this court, with such supplementation as may be provided by applicable state court decisions as to their construction. There are no specific cases in the Massachusetts court on point except Langone. The result is that the statutes as enacted must be examined independently by this Court and given their plain meaning. They have no independent state basis. NAACP v Alabama, 357 US 449, 455. The Massachusetts cases on statutory construction generally are in accord that the statutes as written must

be adhered to. Tsongas v Secretary of the Commonwealth, 362 Mass.708,713 (1972); School Committee of Springfield v Board of Education, 362 Mass 417, 431-432 (1972).

The 1973 statute revoking authority that previously actually was delegated does not require this disregarding, since no state court ever attempted to bend it to accomodate the asserted federal right of the party to add to the laws. Nor did the court of appeals attempt to hold that it could be interpreted in any fashion so as to ignore its plain meaning. 1973 Mass. Acts c 429: AN ACT REPEALING THE LAW PROVIDING FOR PRE-PRIMARY CONVENTIONS OF POLITICAL PARTIES.

The authority revoked by this law was supplemental to the method of nomination papers as it stood before, during and after, and still stands today. Nor did that authority exclude the non-endorsee or any other who collected their signatures and had them certified. These statutes are the rules of decision here.

The other branch of a Malone analysis is the legislative history of the federal scheme of law, the intent of its promulgators: The 15 Percent Rule was propounded as part of the Party Charter at a Charter Convention in 1979. The parties have agreed on certain facts surrounding this convention and the development of the rule: One reason for the convention was

to restore the pre-primary convention and strengthen its authority. The legislative history was brought out by documents circulated and used at that convention. One was entitled: DEMOCRATIC COMMISSION DRAFTS PARTY CHARTER, by Jerome M. Milheur, chairman of the Amherst Democratic Committee, associate professor of political science, University of Massachusetts, and member of the 25-person Charter Commission that preceded the convention. It said: (p.2) "The proposed charter restores the state convention, which was abolished in 1972 by a Democrat-controlled state legislature... Many local democrats attributed the deterioration of town and ward committees

to the elimination of state conventions; and former House Speaker, David Bartley, at a recent state party gathering...called the vote to repeal the convention, taken during his tenure as Speaker, a`mistake.'" Another document included by agreement in the legislative history of the rule was an article that circulated at the convention by two professors from the University of Michigan-Ann Arbor, Dobel and Stockton, entitled "Unreforming the Parties." As its title indicates it advocates a return to the good old days of bossism, smoke-filled rooms, and inside control. A single quote will epitomize: (p. 30) "First, all party decisions relating to policy and candidates should be made by

conventions at which no more than one half of all delegates are chosen by primaries." Another document from Professsor Milheur is in the agreed upon history, entitled: "Statement of Jerome M. Milheur, Chairman, Amherst Democratic Town Committee," it states: (p. R-54) "I want to urge a return to the pre-primary endorsement convention. And I want to urge that its actions be given greater weight as to eventual party nominations." An "Important Notice" was circulated at the convention, also part of the agreed history, on the letterhead of the defendant State Committee, bearing the name of defendant Chairman Atkins, which stated: There is a distinct possibility... that a Party Charter will be held to

supersede state law." The notice then referred to Marchioro v Chaney, 442 US 191, then pending. It was agreed below that the convention discussed but did not resolve whether the superseding of state law would require legislation.

So the rule was intended from the outset to reverse the 1973 revocation of convention authority and supersede state law, as well as disenfranchise the primary. The "accomodation" idea came later, after Chairman Atkins tried and failed to get a number of bills through the democrat-controlled legislature. The original intention was to supersede, and so it remains, despite all the semantical games. No jurist has attempted to bend or

accomodate Mass.Acts 1973 c.439 to suit these later maneuverings, so the intent of the Rule to reverse the withdrawal of authority stands unquestioned. The rule, if valid, pre-empts the statute.

The result is no different with the excluding language of the State statutory scheme for ballot access the "method of nomination papers," if we set aside, in line with the points and authorities above, the attempt to hide the claimed federal right behind a pendente lite state court decision. Mass.Gen.Laws, Ch.53: Sec.2: "no candidate shall be nominated ...in any other manner than is provided in this chapter..." Sec.44: "The nomination of candidates for nomination at state

primaries shall be by nomination papers. In the case of...United States senator, nomination papers shall be signed in the aggregate by at least ten thousand voters" Ch. 54: Sec.41:" Ballots for the use of voters in a voting precinct, polling place, or town hall shall contain the names of all caandidates duly nominated for election therein." This is clearcut state and federal law. Neither the 15 Percent Rule nor the "delegation" discovered by the appeals court comply with Smiley in having been enacted by the legislature in the way that it normally enacts laws. If this clear language that was enacted in accord with Art.I,Sec.4,is to be bent or "accomodated," it can only

be by pre-emption. No state court has the authority to override the dictate of the Times, Places, and Manner Clause unless there is a superior federal constitutional right. The finding below is a pre-emption of these state statutes.

Similarly, Ch.53, Sec. 28 sets "State primaries" for the seventh Tuesday preceding biennial state elections. Like most states Massachusetts has a body of laws and regulations governing the actual conduct of the voting at the polling places. However, if, as here, there are only two statutorily qualified candidates, and one is excluded from the ballot and chooses not to conduct a write-in, then the quest for the nomination and the

primary are over. Under 2 U.S.C.431 a convention that has authority to nominate a candidate is a primary. The court of appeals has held that the convention had the authority to exclude Hopfmann from the ballot, ending his quest unless he should try a write-in candidacy against Kennedy. That was tantamount to nomination for Mr. Kennedy. An insider convention is a different place from the polling place at a statewide primary, and only a state legislature, acting pursuant to Art.I, Sec.4,Cl.1, can change the place of electing a senator. So the 15 Percent Rule has pre-empted Sec.28 as well.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS THAT THE CASE INVOLVES

Amendments I, XIV, XVII. Art.I,Sec.3,Cl.3 and Sec.4,Cl.1. 42 USC 1983, 28 USC 1652, The 15 Percent Rule. Mass. Gen. Laws, Chpt. 53, Secs. 2,6,10, 44, 48, Chpt. 54, Sec. 28.(Lawyers Co-op Auth. Ann. Ed.) Mass. Acts 1973 439 Former Secs. 54,54C and 54D of Chapt. 53. 2 U.S.C. 431.

STATEMENT OF THE CASE

In the 1982 democratic primary for Edward Kennedy's senate seat, Hopfmann was a candidate. In June Hopfmann qualified to be on the fall primary ballot under the statutes. He submitted his signatures on May 25, 1982, and was notified that his name would not be placed on the ballot by

Connolly, the Secretary of State, because of the 15% Rule. Four voters who wished to vote for Hopfmann on the ballot then filed with him as plaintiffs in this suit. There has been no question of Hopfmann's not having complied with the statutes. This suit sought injunctive relief for access to the ballot for the September primary.

In '82 only two Democrats qualified for the democratic senate primary-- Hopfmann and Kennedy. Hopfmann attended the May pre-primary convention where the 15 Percent Rule was first applied, under protest as to its constitutionality, but got only 2 %. Kennedy was the endorsee. This left Kennedy the only candidate for

the Senate nomination on the primary ballot. 31 % of the Democrats voting in September voted a blank rather than vote for Kennedy. Hopfmann and his fellow plaintiffs pleaded a general "further relief" clause and, since the primary, have, under that clause, been seeking the voiding of the primary election and a new special election as required by the rule of the Deep South unconstituional election cases.

In 1982 the Massachusetts legislature passed a bill to reaffirm the statutory method of nomination papers and repudiate the 15 percent rule. The governor sent it to the Supreme Judicial Court(SJC) for an advisory opinion. The SJC refused to

answer the governor's question about the necessity for the bill and whether the 15 percent rule superseded state statutory law but answered his question about the new bill, opining that its reaffirmation of the method of nomination papers would interfere with the party's lawmaking right under the Freedom of Association. The governor let the bill die. It had been preceded by a number of bills seeking enactment of the 15 percent rule into statutory law but they died in the legislature. The SJC AO was cited by Connolly in keeping statutorily qualified candidates off the ballot.

Several state lt. governor candidates were excluded from the ballot along with

Hopfmann. Two also filed suit, and one persisted, Langone, who ultimatelly went all the way to this Court, seeking an appeal or cert. Langone, supra. Along the way the lower courts in this case have frequently deferred to that state litigation and the court of appeals holding is based in large part on a cursory acceptance of it as controlling.

For this and other reasons, Hopfmann has come to emphasize, as the litigation has developed, the decision of this Court in Smiley v Holm, supra, which holds that the "prescription" of state legislatures under the Times, Places and Manner Clause is the normal procedure which the state follows in making its laws. It is the

position of Hopfmann that the party rule which is here claimed to be "added to" the laws does not comply with Smiley. The lower courts have not addressed the questions posed by Smiley, though their disposition of this case appears to squarely overrule it without comment. The Committee have relied heavily throughout on the holding of this Court in The Democratic Party of the U.S. v Wisconsin, 450 US 107 (1981), and its predecessor, Cousins v Wigoda, 419 US 477 (1975). They argue that the Freedom of Association recognized in Democratic Party, under which a national party's rules for selection of delegates to a presidential nominating convention may override a state

law that permits non-party members to vote in an election determining the delegates, extends to a national legislative race and to a confrontation between a state party rule promulgated by an inner group and a State statutory scheme. Their argument is that since the party rule is a federal right the State statutory scheme must be bent to accomodate it, but that we must not look at the federal justification for this "accomodation" because examination of it is foreclosed by Langone since it is really only a matter of a state court's interpretation of state law.

The court of appeals has gone beyond the arguments and the holdings of the district and state courts. Of its own

volition, it has based its affirmance of the district court on a holding that the Massachusetts legislature has "delegated" to the party group which promulgated the 15 Percent Rule the authority to do so, but that that "delegation" is empowered by the First Amendment Freedom of Association and is the exercise of a paramount federal right, although inquiry into that federal right is foreclosed by this Court's denial of cert or appeal in Langone, which only involved state candidates.

Argument

Both courts are straddling the truth. Their opinions are internally logically inconsistent. There cannot be a basic federal right that is protected by state

law and state courts from the light of federal standards and scrutiny.

There is no such thing as a federal constitutional right to private lawmaking authority which enables a political party to add to laws. If a private organization has a right protected by the Constitution it is paramount over state law that infringes upon that right. This is simply the Supremacy Clause. Nothing in the Constitution empowers the holder of a federally protected right to supplant the function of a legislature at will. To hold otherwise, as the court of appeals has done, is to deprive the legislatures of the states of practical control over their own lawmaking. The reinterpretation,

by a state court, of a state statutory scheme, in order to "accomodate" such a nonexistent right, is a nullity. It is not a question of interpretation of a state statute with which federal courts shouldn't interfere. There wasn't any question about the plain meaning of these statutes before this imaginary right was asserted. Whether such an asserted federal right exists is a federal question. The question of whether the Freedom of Association, which has heretofore been held up as a shield by this Court to protect and enhance the cluster of rights stated in the First Amendment, can now be radically extended to allow not just protective association,

but independently exerted participation in the legislative process, is itself a federal question. It does not become a state question because the legislature whose laws are ostensibly being added to is a state one.

The only delegation of federal lawmaking authority which exists here is that of Art.I,Sec. 4, Cl.1, which the courts keep sidestepping. The unanimous interpretation of the meaning of that clause in Smiley, supra, controls. The regulation of U.S. senate races shall be done by state legislatures in the normal course of their lawmaking just like they make all other laws.

Nor is the question decided by this

Court's refusal to grant cert and/or hear an appeal in Langone, supra. This court can now decide whether its refusal is dispositive as asserted. We submit that it is not. The court of appeals equates a state candidacy to a federal legislative candidacy and that is not an apt equation. U.S. senate races are federal matters, regulated by prescription of legislatures coincidentally with their regulation of races for state offices, yes, but federal matters nonetheless. This means that the First and XIVth Amendment questions cannot be separated out from the Times, Places and Manner Clause questions so as to be equatable with the First and XIVth Amendment questions in Langone. Disparate

treatment in election laws, of individuals equally situate, must be the result of lammaking procedures which comply with Smiley or else there is ipso facto a violation of the equality clause. A delegation of authority to a legislature presupposes that any disparate treatment accorded by the lawmaking authority thus delegated will be subject to safeguards of the legislative process, such as requirements for reasonable classification and due deliberation. The 15 Percent Rule divides the registered democrats into separate classes that didn't exist before. The moment that a convention winnows out even one candidate who is qualified under the method of nomination papers, an

inequality that wasn't there before has begun; the votes of these inner groups have acquired more weight than the votes of those who are regular members but didn't attend the caucuses or convention. In the case, as obtains here, where there are only two candidates and one loses at the pre-primary convention by ballot exclusion, the mass of the rank-and-file will be disenfranchised. Here the legislature's rejected such inequality. So the violation of the Times, Places and Manner Clause also violates the Equality Clause of the XIVth Amendment, since the Times, Places and Manner Clause controls the only legal way in which such schemes of classification can be imposed in the

law regulating national legislative races.

All we have, on p.7 of the opinion, is the statement that "an examination reveals" that the 1st Amendment claims of Hopfmann and his voters were disposed of by this Court's rejection of Langone, but no examination. How does a right that is supposed to be exerted by an organization on behalf of all of its members, become a "right" whose avowed purpose is to restore the power of party inner cadres over the rank-and-file? This is a right of dis-association, not association, a control, not a protection.

The arguments of the plaintiffs-appellants on the Times, Places and Manner Clause and the Qualifications Clause are

related directly to their First Amendment claims, which have been ignored. These two clauses were intended to prevent what is going on here. The Qualifications Clause was to prevent "faction," leading toward oligarchy and aristocracy. Our modern equivalents include party elitism. The intent was to prevent candidate control by an inner group. Comments of James Madison in the constituional debates Powell v McCormack, 395 US 486 (1969), at 533-534. The Times, Places and Manner Clause was intended to place the regulation of races for the national legislature in the hands of state legislatures as being closest to the people. Madison's statement in Farrand,

Records of the Federal Convention, Vol. 3, p.311, as quoted U.S. v Gradwell, 243 US 476, 484. The passage of the XVIIth Amendment was consciously an extension of this intent and purpose to senate races. It sets the standard by which both the First Amendment claims and the XIVth Amendment claims must be measured: "by the people." It is the standard by which the prescription of the legislatures for senate races is to be measured. If this Court allows Smiley v Holm to be silently stilettoed, all of these safeguards will bear the wound.

There is no independent non-federal ground that was relied on here, that this Court should defer to, not at any level,

not by the state court, not by Mr. Atkins in pushing the rule, not by the courts below. But such there must be before the matter is disposed of by Langone, supra. NAACP v Alabama, supra, at 455. The non-federal ground claimed must have "fair or substantial support," Ward v County Commisioners, 253 US 17,22. The non-federal ground must "independently and adequately support ...the judgment." Abie State Bank v Bryan, 282 US 765, 773.

Party conduct of primaries is a state function, not a private one; Freedom of Association, a private right, doesn't apply. Smith v Allwright, 321 US 649 (1944); Storer v Brown, 415 US 724 (1974). A private right is not a public control.

REASONS WHY THE QUESTIONS PRESENTED ARE SO SUBSTANTIAL AND REQUIRE FULL CONSIDERATION

The unanimous decision of this Court in Smiley v Holm, supra, will be overturned without having even been addressed.

The First Amendment Freedom of Association will have been converted from a shield protecting private associational rights that enhance expression and communication to a sword with which private associations can wield public lawmaking authority, authority that invalidates statutory enactments by private fiat, without any of the safeguards of the legislative process.

The control of legislatures, state and national, over their own lawmaking

authority, will have been seriously compromised and will eventually be lost.

Party elites will be able to disenfranchise their own rank-and-file. A 15 Percent Rule could as easily be a 95 Percent Rule, or a Rule for favored incumbents, or their favorites.

One man-one vote will have been rendered meaningless, since candidate control will be utilizable to obtain control of the electoral process by a favored elite.

Both the federal system and the system of checks and balances will have been rendered meaningless, since party elites, state and national, will have lawmaking power but will be subject to

neither system.

The Qualifications Clause and the XVIIth Amendment will be will be bypassable by private lawmaking.

Party elites will exercise state functions without state control.

WE ASK FOR PLENARY CONSIDERATION.

Respectfully submitted,

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CERTIFICATE OF SERVICE
UNDER RULE 28

I hereby certify that I am a member of the bar of this Court, and that I have served, by United States mail, first class, postage prepaid, this 11th day of March, 1985, true and accurate copies of this Jurisdictional Statement upon Alexander Gray, Jr., Esq., Assistant Attorney General, One Ashburton Place, Room 2001, Boston, Mass. 02108, counsel of record below for defendants-appellees Secretary of State Connolly and Attorney-General Bellotti, 3 copies for each defendant, and on Keith Long, Esquire, Herrick and Smith, 100 Federal Street, Boston, Mass., 02110, counsel of record below for defendants-appellees Chester G. Atkins and the Democratic State Committee of Massachusetts, 3 copies for each defendant.

Laurence A. Elgin

Rule 28 4(c) Statement

Note: The court below has not certified to the state Attorney-General that the statutes of his state are drawn in question,for obvious reasons.

84-1440

Office - Supreme Court, U.S.
FILED
MAR 11 1985
ALEXANDER L. STEVAS
CLERK

NO._____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1984

ALWIN E. HOPFMANN, GREGORY HESSION,
CLARENCE PERKINS, CLARENCE PAULIN,
and BETH SULLIVAN,

Appellants,

v.

MICHAEL JOSEPH CONNOLLY,
FRANCIS X. BELLOTTI, CHESTER G. ATKINS,
and THE DEMOCRATIC STATE COMMITTEE OF
MASSACHUSETTS,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

Appendix, Vol.1

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Appendix OB: Opinion of the Court Below from which appeal is taken.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1317

ALWIN E.HOPFMANN, ET AL.,

Plaintiffs, Appellants,

v.

MICHAEL JOSEPH CONNOLLY, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. John J.McNaught, U.S. District Judge]

Before

Campbell, Chief Judge,

OB 1

Cowen,* Senior Circuit Judge,

and Bownes, Circuit Judge.

October 22, 1984

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* Of the Federal Circuit,sitting by designation.

COWEN, Senior Circuit Judge. This is an appeal from an order of the District Court for the district of Massachusetts which dismisssed appellants' (plaintiffs') complaint. The principal plaintiff, Alwin E. Hopfmann, was an unsuccessful candidate for the Democratic nomination for the office of United States senator in 1982. He, and four individuals who desired to vote for him, brought this action in the district court against the Secretary of

the Commonwealth of Massachusetts (defendants). Plaintiffs sought injunctive and declaratory relief, claiming that a cornucopia of constituional rights were violated when Hopfmann's name was excluded from the ballot in the Democratic primary. For the reasons to be set forth, we affirm the decision of the district court.

I.

This action is basically an attack on the constitutionality and validity of Article Six, Section III of the Charter of the Massachusetts Democratic Party (the 15 percent rule), which provides that only those candidates who receive 15 percent of

the vote on any ballot at the convention may challenge the convention's endorsement in a state primary election. In 1982, Hopfmann failed to obtain 15 percent of the vote and the Secretary of the Commonwealth of Masssachusetts ordered his name excluded from the primary ballot. The filing of the complaint followed this action.

After the filing of the complaint, defendants filed motions to dismiss. On June 24, 1982, proceedings were stayed pending the decision of the Massachusetts Supreme Judicial Court in the related proceeding of Langone v Secretary of the Commonwealth. A three-judge panel was convened to consider the issues, brought

under the Voting Rights Act, 42 U.S.C. Sec. 1973, and on July 7, 1982, plaintiffs' application, seeking a stay of the denial of preliminary relief and an order directing the Secretary of the Commonwealth to place Hopfmann's name on the Democratic ballot, was denied by Justice Brennan. After resubmittal, it was denied by Justice Rehnquist on July 9, 1982. Hopfmann's petition for a writ of habeas corpus (requesting that his name be placed on the democratic primary ballot) filed September 20, 1982, was denied by the full United States Supreme Court on October 18, 1982. Plaintiffs' petition for a writ of prohibition and/or mandamus and/or injunction, requesting that

Hopfmann's name be placed on the Democratic primary ballot, filed September 30, 1982, was denied by the United States Supreme Court on November 29, 1982. Plaintiffs' application, filed October 25, 1982, seeking a stay of the general election or, in the alternative, a special Primary election, was denied by Justice Brennan on October 26, 1982. After resubmittal, it was again denied,by the full United States Supreme Court, on November 1, 1982. Plaintiffs' applications, filed November 5, 1982, to enjoin the Governor of Massachusetts from certifying the election of Senator Edward M. Kennedy and the United States Senate from seating him, were also denied by the

United States Supreme Court.

A copy of the opinion of the Masachusetts Supreme Judicial Court in Langone v Secretary of the Commonwealth, 446 N.E. 2d 43 (Mass. 1983), was filed with the district ocurt on February 23, 1983. On April 8, 1983, a copy of the order of the United States Supreme Court, dismissing the appeal in that case and denying the alternative petition for certiorari was filed with the district court. Langone v. Connolly, 103 S.Ct. 1510, 75 L.Ed. 2d 938 (1983).

On April 9, 1984, the district court, treating defendants' motions to dismiss as motions for summary judgment, granted them and dismissed the complaint.

II.

Here, as in the court below, plaintiffs' principal attack on the 15 percent rule is the contention that the enforcement of the rule violates their rights under the First and Fourteenth Amendments to the United States Constitution. The parties are agreed that Hopfmann had complied with the state statutory requirement (Mass. G.L. c. 53) for having his name placed on the primary ballot. To comply with state requirements, candidates must submit nomination papers signed by 10,000 voters. Specifically, plaintiffs argue that since this statutory requirement had been met,

the denial of Hopfmann's access to the ballot in the primary election and the deprivation of the rights of the remaining parties to participate in choosing the party's candidate, abridged rights guaranteed to them by the First and Fourteenth Amendments.

As stated above, proceedings in the district court were stayed pending the decision in Langone v. Secretary of the Commonwealth, supra, which was decided February 16, 1983. Contrary to plaintiffs' position in this appeal, the Supreme Judicial Court of Massachusetts held in that case that G.L. c. 53 incorporated the 15 percent rule, and that the rule did not deprive candidates or

voters of their rights of free speech, association, due process, or equal protection guaranteed to them by the First and Fourteenth Amendments of the United States Constitution. The United States Supreme Court summarily dismissed the appeal from that decision for want of jurisdiction in April 1983. Langone v. Connolly, supra. The district court's decision in this case was largely based on the decision of the Supreme Judicial Court and the dismissal of the appeal in that case by the United States Supreme Court.

Relying on Hicks v. Miranda, 422 U.S. 332, 344 (1975), defendants urge that the dismissal of the appeal by the United States Supreme Court for lack of

jurisdiction, i.e., for want of a substantial federal question, is a decision on the merits which is binding on this court and is dispositive of the First and Fourteenth Amendment claims. Citing Maryland v. Baltimore Radio Show, 338 U.S. 912, 919 (1950), plaintiffs respond that it is not clear that the Supreme Court's decision was a dismissal of the appeal, and instead, may be construed as a denial of the petition for certiorari. Consequently, they argue that the decision has no precedential value in this court.

We agree with the contentions of the defendants. In Langone v. Connolly, the

appellants couched their jurisdicitonal statement in the alternative, requesting that the statement be treated as an appeal under 28 U.S.C. Sec. 1257(2),and to the extent that the statement would not be considered an appeal under that subsection, they requested that it be treated as a petition for certiorari under 28 U.S.C. Sec. 1257(3). The order of dismissal of the United States Supreme Court stated:

> The appeals are dismisssed for want of jurisdiction. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari is denied. [emphasis added.]

We find that the circumstances in Langone v. Connolly show that plaintiffs'

application to the United States Supreme Court was treated as an appeal under 28 U.S.C. Sec. 1257(2) and dismissed. The dissent of Justsice Stevens, in which Justice Rehnquist and Justice O'Connor joined, leads us to that conclusion. The dissent of Justice Stevens stated in part:

> These appeals present substantial, unresolved questions regarding the accommodation of competing First Amendment values; the interests of would-be candidates and voters in eligibility for the ballot,andl the interests of party members in political association without undue governmental intrusion.***
>
> The case is properly before this Court on appeal. ***

75 L.Ed 2d at 938 and 939.

The language in the majority's dismissal of the petition is understandable when read in conjunction with appellants' jurisdictional statement. We think that the majority of the Supreme Court was taking an extra precaution to deny the application in toto, since the order stated that the appeal was dismissed for lack of jurisdiction, but that if the papers were treated as a petition for certiorari, the petition was also denied.

In holding that the decision of the United States Supreme Court in Langone v. Connolly is final and binding, we are mindful of Justice Brennan's concurring opinion in Mandell v. Bradley, 432 U.S. 173 (1977), giving narrow scope to summary dispositions by the United States Supreme Court. In pertinent part, that opinion states:

> After today, judges of the state and federal systems are on notice that before deciding a case on the authority of a summary disposition by this Court in another case, they must (a) examine the jurisdictional statement in the earlier case to be certain that the constitutional questions were the same and if they were, (b) determine that the judgment in fact rests upon decision of those questions, not even arguably upon some alternative nonconstitutional ground." The judgment

> should not be interpreted as deciding the constitutional questions unless no other construction of the disposition is plausible. [432 U.S. ata 180]

an examination of the appellants' jurisdicitonal statement clearly shows that the same constitutional questions which are raised by plaintiffs' First and Fourteenth Amendment claims in this case, were at issue in Langone v. Secretary of the Commonwealth, and that the judgment of the court in that case rested upon a decision of those constitutional questions.

III.

Plaintiffs maintain that even if this court holds that the United States Supreme Court action in Langone v. Connolly is

dispositive of their First and Fourteenth Amendment claims, they are still entitled to prevail, because the enforcement of the 15 percent rule violates Article I, Section 4, Clause 1, Article 1, Section 3, Clause 3, and the Seventeenth Amendment of the Constitution.

We consider first the claim based on Article I, Section 4, Clause 1. This clause provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.

According to plaintiffs, this provision mandates that the state legislatures alone

may prescribe the conditions under which elections are held. Therefore, they declare that the imposition of any conditions on elections for the United States Senate by any entity other than the state legislature, such as the Democratic Party through the 15 percent rule, is an unlawful usurpation of the state legislature's constitutional prerogative.

This argument reaches too far. Plaintiffs theory rests on the proposition that no power to impose restrictions on regular or primary elections may be delegated to political parties by the state legislature. Such an extreme interpretation, if adopted with respect to primary elections, could effectively

destroy the ability of political parties to select members of their own choice--a right implicit in the freedom of association guaranteed by the First and Fourteenth Amendments of the Constitution. See Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982); Democratic Party of the United States v. Wisconsin, 450 U.S.107 (1981); Cousins v. Wigoda, 419 U.S. 477 (1975).

The potential for interference with the State Democratic Party's ability to select the candidate of its members' choice is apparent from the statutory rules governing primary elections in Massachusetts. These rules provide that nomination papers for the primary ballot

may be signed by 10,000 registered voters, whether or not they are enrolled party members, G.L c. 53, Sec. 46, and that both enrolled party members and unenrolled registered voters may vote in the primaries, as long as they enroll at the polls just before receiving ballots. G.L. c. 53, Sec. 37. Thus, as was pointed out in Langone v. Secretary of the Commonwealth, 446 N.E. 2d at 46:

> ***if the only requirements for primary ballot access were the existing Massachusetts statutory requirements unaugmented by party rule, "a candidate for statewide election could be placed on the general election ballot as the Democratic Party candidate, with little or no support from the regular party membership." Id. 385 Mass. at at 1205, 434 N.E. 2d 960. The Justices concluded that this

> would substantially infringe the Democratic Party's right of freedom of association, id. at 1206, 434 N.E. 2d at 960, and the Commonwealth's interest in the integrity of the election process does not constitutionally justify elimination of party control over who the party's candidates in the general election will be.

In that case, the Supreme Judicial Court of Massachusetts construed G.L. c. 53 as "not to exclude, but rather, to accomodate the 15 percent rule." 446 N.E. 2d at 51.

Plaintiffs' interpretation of Article I, Section 4 also runs contrary to other decisions on the point, which have found it unobjectionable for state legislatures to delegate some of their regulatory authority over primray election balloting

to state political parties. Skeen v. Hooper, 631 F.2d 707 (10th Cir. 1980); Tansely v. Grasso, 315 F. Supp. 513 (D.Conn. 1970); Clark v. Rose, 379 F. Supp. 73, 77 (S.D.N.Y. 1974).

Accordingly, we hold that the 15 percent rule represents merely a rule promulgated by authority which has been delegated by the state legislature, and is in no way violative of Article I, Section 4 of the Constitution.

IV.

Plaintiffs next argue that the application okf the 15 percent rule transgresses Article I, section 3, Clause 3 of the Constitution in that it unlawfully adds a qualification for the

office of United States Senator beyond the age, citizenship and residency requirements of the Constitution.

As the defendants have correctly pointed out, the 15 percent rule does not add a qualification that precludes Hopfmann from obtaining the office of United States Senator. The rule merely adds a restriction on who may run in the Democratic partay primary for sttewide political office and potentially become the party nominee. The cases cited by plaintiffs to the effect that neither Congress nor the states can add to the constitutional qualifications for office are ianapposite. Cf. Powell v. McCormack, 395 U.S. 486,547,551 (1969).

Unlike the additional requirements involved in the cases cited by plaintiffs, failure to comply with the 15 percent rule does not render a candidate ineligible for the office of United States Senator. An individual is free to run as the candidate of another party, as an independent, or as a write-in candidate. If he is elected and meets the requirements of Article I, Section 3, he will be qualified to take office. As the Wyoming Supreme Court stated in State v. Crain, 197 P.2d 864, 871 (Wyo.1948), the test to determine whether or not the "restriction" amounts to a "qualification" whithin the meaning of Article I, Section 3, is whether the candidate "could be elected if his

name were written in by a sufficient number of electors."

If plaintiffs' position were accepted, it would invalidate most of the state regulatory statutes, such as G.L. c. 53, which also restricts ballot access by requiring, among other things, that each candidate must submit nominating papers signed by at least 10,000 registered voters. Similar statutes have been upheld by the Supreme Court as an adjunct to the states' regulatory powers under the times, place, and manner" clause of Article I, Section 4, in order to insure that "some sort of order, rather than chaos, is to accompany the democratic processes." Storer v. Brown, 415 U.S. 724, 730

(1974); see also Rosario v. Rockefeller, 410 U.S. 752 (1973).

We therefore conclude that the 15 percent rule cannot be said to violate Article I, Section 3, Clause 3.

V.

Plaintiffs' final contention is that the 15 percent rule violates the Seventeenth Amendment to the Constitution, which provides in pertinent part:

> The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

Plaintiffs insist that the 15 percent rule contravenes this provision, because the rule applies only to candidates for statewide office, whereas the election of

state representatives is not governed by the rule.

This contention was not raised below by plaintiffs , and is not properly before this court. See Johnson v. Allyn & Bacon, Inc., 731 F.2d 64, 73 (1st Cir. 1979); Johnston v. Holiday Inns, Inc., 595 F.2d 890, 894 (1st Cir. 1979).

However, if it is assumed arguendo that the contention is properly before us, we find that it is entirely lacking in merit. The 15 percent rule does not impose a qualification on voters for participation in elections for United States Senator which does not apply to voters in elections for United States Senator which does not apply to voters in

elections for representatives in the state legislature. As previously stated in this opinion, the 15 percent rule only imposes a restriction on those who wish to participate in the primary of the Democratic party and to obtain that party's nomination, whether they be candidates for the United States Senate or for the lower house of the state legislature. We repeat that any individual who fails to meet the requirements of or is dissatisfied with the 15 percent rule has the opportunity to run as a candidate of another party, as an independent, or to conduct a write-in campaign. Forsenius v. Harman, 235 F.Supp. 66 (E.D. Va. 1964), relied on by

plaintiffs, is inapposite. In that case, the state statute provided that no voter would be entitled to vote in any federal election unless he offered proof of continuing residence by filing a certificate in the time and manner prescribed by the state law.

AFFIRMED.

ORDERS BELOW

Order Affirming District Court's Dismissal

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1317

ALWIN E. HOPFMANN, ET AL.,
Plaintiffs, appellants,

v.

MICHAEL JOSEPH CONNOLLY, ET AL.,
Defendants, Appellees.

JUDGMENT

Entered: October 22, 1984

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts,

and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: the judgment of the District Court is affirmed.

By the Court:

Francis P. Scigliano

Clerk

Order Denying Rehearing

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1317.

ALWIN E. HOPFMANN, ET AL.
Plaintiffs, Appellants

v.

MICHAEL JOSEPH CONNOLLY, ET AL.
Defendants, appellees.

BEFORE

CAMPBELL, Chief Judge,
COWEN* Senior Circuit Judge,
COFFIN, BOWNES, BREYER AND TORRUELLA,
Circuit Judges.

ORDER OF COURT

Entered: December 10, 1984

Upon consideration of "Petition for Rehearing and Suggestion for Rehearing En Banc", which document was submitted to the members of the panel and to the judges of the Court who are in regular active service; and

The judges of the panel having voted to deny the petition for rehearing, and

the judges of the Court who are in regular active service having voted against rehearing en banc,

It is orderd that said application for hearing en banc is hereby denied.

By the Court,

Francis P. Scigliano

Clerk.

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* Of the federal Circuit, sitting by designation

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

ALWIN E. HOPFMANN, ET AL,

Plaintiffs,

v. CIVIL ACTION NO. 82-1530-MC

CIVIL ACTION NO. 84-393-MC

MICHAEL JOSEPH CONNOLLY, ET ALS,

Defendants.

MEMORANDUM AND ORDERS DISMISSING COMPLAINTS

McNAUGHT, D. J.

In his complaint in 1982 Mr. Hopfmann,who sought to be a candidate in the Democratic primary for United States Senator, but was excluded from the ballot for failure to obtain the 15 percent of the votes cast at the Democratic Party Convention, attacked the validity of the the "15% Rule" for the first time. (The Rule requires that if a person is to run in a party primary, he or she must have received 15% of the votes on any ballot at the Convention endorsing the candidates.) His was not the only challenge to the

Rule. Frederick C. Langone brought an action in the courts of the Commonwealth of Massachusetts. Eventually the Supreme Judicial Court held that the 15 Percent Rule was not excluded by Chapter 53 of the Masachusetts General Laws; that the statute accommodated the Rule and that the Rule was not constitutionally invalid. Appeals were taken to the Supreme Court of the United States. Those were dismissed for want of jurisdiciton. Certiorari petitions were denied.

At the hearing on the issuance of a preliminary injunction on the 1984 complaint (in February of this year), the parties agreed that the matters submitted to the three-judge court on the 1982

complaint are no longer pending. They have been resolved. Defendants contend that no substantive issues remain for resolution by me as the single judge assigned to the action. Plaintiffs disagree. In early 1983, I asked that a statement of issues (for the single judge) be submitted by plaintiffs . It was filed February 9, 1984.

Motions to dismiss both actions (treated now as motions for summary judgemetn) were taken under advisement, once the parties had an opportunity to submit written arguments and briefs. After deliberation I conclude and rule that judgment for defendants must be entered in both cases.

With respect ot the civil Action No. 82-1530-MC, I am in agreement with the decision of the Supreme Judicial Court upholding the Rule's validity, and for the reasons expressed therein. Extensive repetition of those reasons is unnecessary. See Langone v. Secretary of the Commonwealth, 446 N.E.2d 43 (Mass. 1982f). The analysis of the right to associate with a political party, protected by the First and Fourth Amendment ot the United States Constitution, the interest of a party in ensuring that its members will have an effective role in deciding who will appear as a party's candidate, the fundamental right of association in a political party

and the integrity of the election process are all discussed as factors which do not require preclusion of the Rule as obstacles, but provide foundations for it. The Supreme Judicial Court cited Democratic Party of United States v. Wisconsin, 450 U.S. 1007 (1981) as authority for the proposition that the Rule requiring a modicum of support from members with substantial affiliation with the party is one mode of assuring freedom of association--association with the ability to limit control of its decisons to those sharing its interests. It was said, (and properly), that although the Rule has some impact on voters' rights and those of candidates, access to the ballot

was not denied unfairly.

Plaintiffs' claims were rejected by the Supreme Court (April 4, 1983). Appeals were dismissed and certiorari denied. No substantive issue remains to be determined. Plaintiffs' Article I, Sec. 4 claims have been rejected twice by a Single Justice of the Supreme Court. There is no substantial federal question to be determined and the action is dismissed on its merits.

The complaint in civil Action No. 84-393 was filed February 10, 1984. In a statement of reasons for denial of a preliminary injunction filed February 21 of this year, I wrote:

As stated hereinbefore, the plaintiff

in the second action does not concede the validity of the 15 Percent Rule. Indeed, it is specificallky averred in Paragraph XXXV that the "15 Percent Rule is an unconstitutional act", and elections thereby affected are "void" and a new special election should be held. Mr. Hopfmann, as a would-be candidate for the office of United States Senator from the Commonwealth of Massachusetts and as a voter, asserts that if the Rule is not invalid, it should be applied to all candidates for the office of President of the United States and for the office of United States Senator from Massachusetts; that it

should be applied not only to Democrats but to Republicans as well; that all persons who are candidates or "who have announced that they are thinking" of becoming candidates for the office of President of the United States or the United States Senate should be enjoined "until they comply with the 15 Percent Rule of the Democratic Party" from participating in any primary. He would have this Court enjoin the Secretary of the Commonwealth and the Director of Elections to remove all names from the presidential primary ballot in March, and to order the Republican State Committee also to enforce the

"15 Percent Rule".

If Mr. Hopfmann is denied preliminary relief and the 15 Percent Rule remains in effect, the rule will be applied to him and to all other potential candidates at the Democratic party's primary convention, scheduled to be held in June in the Commonwealth of Massachusetts. Should he fail to meet the requirements of the 15 Percent Rule, the Secretary of the Commonwealth will not allow his name to appear upon the printed primary ballot. Mr. Hopfmann will have suffered harm at that time. On the other hand, if an injunction as

requested in this action is granted, the campaigns of all candidates for the presidency will be disrupted, as well as the campaigns of all candidates for the United States Senate from Massachusetts (Democrat and Republican alike). The public interest in orderly timely elections will be disrupted as well. A balance of these factors militates against the issuance of an injunction.

The reasons that I gave at that time for the conclusion that the plaintiffs had not shown a likelihood of success on the merits afer further study, provide the basis for the conclusion that the judgment must enter in favor of the defendants.

His contention that the 15 Percent Rule is invalid has been testedinthe past, and found wanting. It has been the subject of adverse opinion by the Supreme Judicial Court of Massachusetts, and the Supreme court of the United States thereafter dismissed appeals and denied certiorari. On two other occasions, single justices of the Supreme Court of the United States have failed to find merit in his claims. Secondly, he asks to have a rule of the State Democratic Committee applied to persons seeking the Republican nomination. There will be no Republican nominating

convention in Massachusetts in 1984. Neither the State nor this Court can enforce a Democratic 15 Percent Rule upon the Republican party. Thirdly, Mr. Hopfmann seeks to have the 15 Percent Rule of the Democratic Party applied to candidates for the presidency. The presidency is an office of nation-wide scope. It is not a state-wide office as Mr. Hopfmann clailms. Finally, as we were reminded in argument, the purpose of the presidential primaries in the Commonwealth of Massachusetts is not to provide party nominees, but establishes the proportionality of the Massachusetts

delegations to the nominating conventions.

Plaintiffs, other than Mr. Hopfmann, have no standing to bring this action. He, at least, was a potential candidate for office. The others cannot claim that the Rule is applied against them at all. They have no personal involvement, and appear to be seeking an opinionfrom this Court of an advisory nature only, for the possible benefit of others. United Public Workers of America v. Mitchell, 330 U.S. 75 (1947) requires the conclusion of lack of standing on their part. Indeed, there is even qustion pertaining to the standing of Mr. Hopfmann. Even assuming standing, the complant must be and is hereby

dismissed.

[signature]

JOHN J. McNAUGHT
UNITED STATES DISTRICT
JUDGE

April 9, 1984

OB 49

MEMORANDUM AND ORDER ON REQUEST FOR THE CONVENING OF A THREE JUDGE COURT, in the United States District Court for the District of Massachusetts, Alwin E. Hopfmann, et al., Plaintiffs v. Michael Joseph Connolly, Secretary of State, et al., Civil Action No. 82-1530-MC, dated June 22, 1982, signed by the Honorable John J. McNaught.

This matter came on for a hearing on a motion for a stay. The plaintiff Alwyn (sic) E. Hopfmann and three registered voters filed suit against officers of the Commonwealth of Massachusetts and the Democratic State Committee, challenging the validity of the Massachusetts State Democratic Committee charter and its

"15% rule". The plaintiffs request the convening of a three-judge court, alleging their right to such court under 42 U.S.C. § 1973c and 28 U.S.C. § 2284.

Similar actions have been begun by other persons in the courts of the Commonwealth of Massachusetts, and in open court on June 21, 1982, the parties advised me that issue has been joined and the matter formerly before Mr. Justice Liacos has now gone to the full bench. It appears that the issue may well be decided by the Surpeme Judicial Court and that an order may be entered by the full bench with an opinion to follow. The parties reported to me that there is no reason to believe that the Supreme Judicial Court will delay in making its decision.

After hearing, I have decided to grant a stay of this action, but have re-

quired that responsive pleadings be filed in the usual course. The stay is to expire upon the issuance of an order by the Supreme Judicial Court.

The defendants in the action before me have filed a motion to dismiss in the nature of a motion based upon a failure to file a claim upon which relief may be granted. F.R.Civ.P. 12(b)(6).

A dispute has arisen as to whether I, as a single judge, am empowered to hear and decide on a motion to dismiss under these circumstances. Upon consideration, I am of the opinion that if such a motion is to be granted, it must be granted by a court of three judges and not by the single judge who initiates the three-judge proceedings. See Svejkovsky v. Honorable Edward A. Tamm, 326, F.2d 657 (D.C. Cir. 1963).

Accordingly, I intend to request the convening of a three-judge panel to hear and determine the motion to dismiss, in the event that the ruling which eventually will be made by the Supreme Judicial Court of the Commonwealth of Massachusetts is not dispositive of the entire problem.

/S/ John J. McNaught
United States District Judge

MEMORANDUM AND ORDER DENYING PRELIMINARY INJUNCTION in a special three-judge court formed pursuant to 42 USC § 1973c and 28 USC § 2284, Alwin E. Hopfmann, et al., Plaintiffs v. Michael Joseph Connolly, Secretary of State, et al., Defendants. Civil Action No. 82-1530-MC. Dated July 7, 1982.

This action came on to be heard on plaintiffs' request for a preliminary injunction and motions to dismiss by the defendants.

After argument and deliberation, the court cannot say at this juncture of the proceedings that there is a reasonable likelihood of success of the merits of the request for declaratory judgment. Specifically, the absence of a sufficient likelihood of success as to the issues of (1) whether the Commonwealth of

Massachusetts is a "covered jurisdiction" under the Voting Rights Act and (2) whether the complaint is defective in its failure to contain a good-faith allegation of racially discriminatory intent or impact requires a denial of the injunction.

July 7, 1982

/s/ Frank M. Coffin,
Chief Judge U.S. Court
of Appeals for the
First Circuit

/s/ Walter J. Skinner,
United States District
Judge

/s/ John J. McNaught
United States District
Judge

MEMORANDUM AND ORDER issued by the Honorable John J. McNaught as a single court judge below, Alwin E. Hopfmann, et al., Plaintiffs, v. Michael Joseph Connolly, Secretary of State, et al., Defendants. Civil Action No. 82-1530-MC, dated July 7, 1982.

As a single judge, I adopt the reasons set forth by the members of the three-judge court for the denial of the preliminary injunctive relief requested by the plaintiffs under the Voting Rights Act. As a single judge, furthermore, I am unable to find that there is a reasonable prospect of success on the merits insofar as plaintiffs' complaint is bottomed upon allegations of a violation of rights of plaintiffs under the First and Fourteenth Amendments of the Constitution of the

United States, or upon Articles VIII and IX of the Constitution of the Commonwealth of Massachusetts in its Declaration of Rights, or upon the theory of constitutional equitable estoppel. It is my opinion also that the plaintiff Hopfmann has not demonstrated a reasonable prospect of success on his cause of action resting upon Title 42 § 1983.

Preliminary injunctive relief denied.

The motions to dismiss on the theories of liability within the province of the single judge are under advisement as of this date.

/s/ John J. McNaught
United States District Judge

DENIAL OF PRELIMINARY STAY ISSUED BY MR. JUSTICE BRENNAN OF THIS COURT in a letter dated July 9, 1982 from the Office of the Clerk, Supreme Court of the United States, Alexander L. Stevas, Clerk, by Katherine Downs, Assistant Clerk In Re Alwin E. Hopfmann, etc., et al. v. Michael Joseph Connolly, etc., et al. A-18.

Your application for a stay in the above-entitled case has been presented to Justice Brennan, who has endorsed thereupon the following:

"Denied

Wm. J. Brennan, Jr.

7/8/82"

DENIAL OF PRELIMINARY STAY ISSUED BY MR. JUSTICE REHNQUIST OF THIS COURT in a letter dated July 9, 1982 from the Office of the Clerk, Supreme Court of the United States, Alexander L. Stevas, Clerk, by Katherine Downs, Assistant Clerk In Re Alwin E. Hopfmann, etc., et al. v. Michael Joseph Connolly, etc., et al. A-18.

Pursuant to your request of July 9, 1982, your application for a stay in the above-entitled case has been presented to Justice Rehnquist, who has endorsed the following on your request:

"7/9/82

Denied

WHR"

OPINION OF THE JUSTICES TO THE GOVERNOR, Supreme Judicial Court of Massachusetts. April 23, 1982. 385 Mass. 1201.

A question was propounded by the Governor of the Commonwealth of Massachusetts to the Justices of the Supreme Judicial Court with respect to the nomination of party candidates for placement on the state primary ballot. The Justices of the Supreme Judicial Court, gave answer that proposed mandatory statute providing that "Notwithstanding the charter, rule or by-law of a political party, any candidate, who is enrolled in such political party, submitting nomination papers subject to the provisions of this chapter shall be a candidate for nomination of the state primary" would abridge the constitutional rights of the party and its members to

associate while allowing candidates to be placed on the state primary ballot in contravention of the party's charter.

Question answered.

On April 23, 1982, the Justices submitted the following answers to questions propounded to them by the Governor.

To His Excellency, the Governor of the Commonwealth of Massachusetts:

The Justices of the Supreme Judicial Court respectfully respond to the questions set forth in the Governor's request dated April 5, 1982, and transmitted to the Justices on April 6, 1982.

General Laws c. 53, § 44, as amended through St. 1981, c. 278, § 1, provides in part that "(t)he nomination of candidates for nomination at State primaries shall be by nomination papers." There is pending before the Governor for his approval

House Bill No. 5852, which would amend c.53, § 44, by inserting after the first sentence the following sentence: "Notwithstanding the charter, rule or by-law of a political party, any candidate, who is enrolled in such political party, submitting nomination papers subject to the provisions of this chapter shall be a candidate for nomination at the state primary." Article Six, Section III, of the charter of the Democratic party of the Commonwealth of Massachusetts, provides "There shall be a State Convention in even-numbered years for the purpose of endorsing candidates for statewide offices in those years in which such office is to be filled. Endorsements for statewide office of enrolled Democrats nominated at the Convention shall be by majority vote of the delegates present and voting, with the

proviso that any nominee who receives at least 15 percent of the Convention vote on any ballot for a particular office may challenge the Convention endorsement in a State Primary Election."

Stating his uncertainty "as to the necessity or constitutionality of H.5852 if enacted into law," the Governor requests, pursuant to the authority contained in Pt. II, c.3, art. 2, of the Massachusetts Constitution, as amended by art. 85 of the Articles of Amendment, the opinion of this court on the following questions of law:

> "1. Does the fifteen percent rule in the Democratic Charter supersede the current provisions of General Law, Chapter 53, Section 44, or can a candidate be placed on the Democratic State Primary Ballot by nomination papers without having received fifteen percent of the vote at the party convention?
>
> "2. Would enactment of H.5852 allow a candidate to be placed on the Democratic State Primary Ballot by nomination papers without having received fifteen percent of the vote at the party convention?"

The constitutional provision which empowers us to answer questions propounded by the Governor, the Council, and the Legislature, restricts our authority to "important questions of law" and to "solemn occasions." Part II, c. 1, § 1, art. 2 of the Massachusetts Constitution. To preserve the principle of separation of powers, fundamental in our system of government, we are bound strictly to observe these constitutional limitations. Answer of the Justices, 362 Mass. 914, 916-917, 291 N.E. 2d 598 (1973). As the Justices have ad-

vised, "By a solemn occasion the Constitution means some serious and unusual exigency. It has been held to be such an exigency when the Governor or either branch of the Legislature having some action in view has serious doubt as to their power and authority to take such action, under the Constitution, or under existing statutes." Answer of the Justices, 373 Mass. 867, 871, 366 N.E. 2d 730 (1977), quoting from Answer of the Justices, 148 Mass. 623,625-626, 21 N.E. 439 (1889).

(1) Because question number 1 inquires only about the legal effect of the current statute in light of the Democratic party charter, and not about the Governor's authority to take action, there is no solemn occasion authorizing us to answer. Opinion of the Justices, ___ Mass. ___, ___ _ ___, Mass.Adv. Sh.

(1981) 1361, 1381-1382, 424 N.E. 2d 1092. It may well be that the Justices' answer to question number 1 would help the Governor determine the "necessity" of House No. 5852 in view of the present statute, a concern expressed in the request. However, whether the bill is necessary raises the question whether it is wise or expedient for the Governor to approve the bill. The Justices are not empowered to answer questions bearing on the wisdom or expediency of proposed legislation. Answer of the Justices, 319 Mass. 731, 734, 66 N.E. 2d 358 (1946). Opinion of the Justices, 314 Mass 767, 771-772, 49 N.E. 2d 252 (1943). Not having the authority to answer question number 1, we respectfully request that we be excused from answering it.

In the context of the Governor's expressed uncertainty as to the constitutionality of House No. 5852, we interpret question number 2 to inquire whether, if House No. 5852 were approved, G.L. c. 53, § 44, as thereby amended, would abridge the constitutional rights of the Democratic party and its members to associate by allowing candidates to be placed on the Democratic State primary ballot in contravention of the party's charter. The Governor has a present duty to act on House No. 5852. Part II, c. 1 § 1, art. 2, of the Massachusetts Constitution. This duty, and the Governor's expressed doubt about whether House No. 5852 would be constitutional if he approved it, present a solemn occasion requiring our answer to the second question. See Opinion of the Justices, 314 Mass. 767, 772, 49 N.E. 2d

252 (1943).

"The (Democratic Party of the Commonwealth) and its adherents enjoy a constitutionally protected right of political association. 'There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of "orderly group activity" protected by the First and Fourteenth Amendments ... . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom.' Kusper v. Pontikes, 414 U.S. 51, 56-57, 94 S.Ct. 303, 307, 38 L.Ed.2d 260 (1973). 'And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States.' Williams v.

Rhodes, 393 U.S. 23, 30-31, 89 S.Ct. 5, 10-11, 21 L.Ed. 2d 24 (1968). Moreover, '(a)ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.' Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S. Ct. 1203, 1211, 1 L.Ed.2d 1311 (1957); see NAACP v. Button, 371 U.S. 415, 431, 83 S. Ct. 328, 337, 9 L.Ed.2d 405 (1963)." Cousins v.Wigoda, 419 U.S. 477, 487-488, 95 S.Ct. 541, 547, 42 L.Ed.2d 595 (1975). "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." Democratic Party of U.S. v. Wisconsin, 450 U.S. 107, 122n22, 101 S.Ct. 1010, 1019, 67 L.Ed.2d 82 (1981), quoting L. Tribe, American Constitutional Law 791

(1978). A determination of who will appear on a general election ballot as the candidate endorsed by an identified political party is a critical decision for that party. The party, therefore, has a substantial interest, implicit in its freedom of association, to ensure that party members have an effective role in that decision. Democratic Party of U.S. v. Wisconsin, supra.

Within the Commonwealth, the winner by a plurality of a party primary becomes that party's candidate for statewide office in the general election. G.L. c 53, § 2. Voting in party primaries is limited to enrolled party members and unenrolled voters who enroll at the polls just before receiving ballots. G.L. c. 53, § 37. Apart from Article Six, Section III, of the State Democratic party charter, in order to be placed on a party's primary

ballot, a candidate for statewide office must be an enrolled member of that party, G.L. c. 53, § 48, and submit nominating papers signed by at least 10,000 registered voters, c. 53, § 44, who may be enrolled in that party or unenrolled. G.L. c. 53, § 46. Therefore, apart from Article Six, section III, of the State Democratic party charter, a candidate for statewide election could be placed on the Democratic party ballot and win the primary, thus becoming entitled to be placed on the general election ballot as the Democratic party candidate, with little or no support from the regular party membership.[1/]

1/ As of February, 1980, 39.9% of all registered voters in the Commonwealth were unenrolled. Bachrach v. Secretary of the Commonwealth, ___ Mass. ___, ____, Mass.Adv.Sh.(1981) at 97 415 N.E.2d 832.

The State Democratic party charter, Article Six, Section III, proviso that any nominee who receives at least 15% of the vote at the State convention may challenge the convention endorsement, by negative implication adds to the statutory requirement of nomination papers for placement on the primary ballot the further requirement that a candidate must receive at least fifteen percent of the convention vote. This has the double effect of limiting the number of candidates on the primary ballot, thereby eliminating the confusion that may result from too many candidates, and of limiting the candidates to those with significant party support, thereby giving the party members an effective role in choosing the party's candidate in the general election. The State has been held to have a compelling

interest in limiting the number of candidates in order to prevent voter confusion. American Party of Texas v. White, 415 U.S. 767, 780-781, 94 S.Ct. 1296, 1305-06, 39 L.Ed.2d 744 (1974). Storer v. Brown, 415 U.S. 724, 732, 94 S.Ct. 1274, 1280, 39 L.Ed. 2d 714 (1974). A political party has a parallel interest.

If House No. 5852 were approved, G.L. c. 53, § 44, as thereby amended, would appear to override the charter requirement of 15% of the convention vote for placement on the primary ballot and, together with c. 53, § 46, would eliminate the Democratic party's control of who its candidate in the general election would be. This would substantially infringe the right of freedom of association of the Democratic party and its members, and therefore, to pass constitutional

muster, it must serve a compelling State interest, Sears v. Secretary of the Commonwealth, 369 Mass. 392, 397, 341 N.E. 2d 264 (1975), and do so with as little infringement on constitutional rights as possible. See Riddell v. National Democratic Party, 508 F.2d 770, 776-778 (5th Cir. 1975). We must apply "strict scrutiny" to its justification and operation. Bachrach v. Secretary of the Commonwealth, ___ Mass. ___, ___, Mass.Adv.Sh. (1981) 93, 101, 415 N.E.2d 832.

The Commonwealth unquestionably has a compelling interest in the overall regularity of the election process, including limitation of the number of candidates on the ballot so as to avoid voter confusion and ensuring that the candidates whose names appear on the ballot have significant community support.

American Party of Texas v. White, 415 U.S. 767, 782, 94 S.Ct. 1296, 1306, 39 L.Ed.2d 744 (1974). This applies to the conduct of primary elections, Kusper v. Pontikes, 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973), Rosario v. Rockefeller, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d L (1973), which are an important part of the procedure by which the ultimate office holder is chosen. Sears v. Secretary of the Commonwealth, supra, 369 Mass. at 398, 341 N.E.2d 264. These interests are served by the requirement that each candidate for statewide office obtain the signatures of at least 10,000 registered voters on nomination papers, G.L. c. 53, § 44, but they are not served by the elimination of a 15% convention vote requirement for placement on the primary ballot. Elimination of the Democratic party charter

requirement could only increase the number of candidates on the primary ballot, with a resulting increased potential for voter confusion.

We assume that House No. 5852 was designed to promote the integrity of the election process. Nevertheless, the Commonwealth's compelling interest in the integrity of the election process does not constitutionally justify elimination of party control over who the party's candidate in the general election will be. This view finds support in Democratic Party of U.S. v. Wisconsin, supra. In that case, the United States Supreme Court struck down a State statute that compelled the party to seat delegates at its national convention who were bound by the statute to vote on the first ballot with the results of a primary election in which any

registered voter could participate regardless of party affiliation. This was contrary to the national party rules. Wisconsin impermissibly attempted to override the national party's attempt to limit "those who could participate in the processes leading to the selection of delegates to their National Convention." Id. 450 U.S. at 122, 101 S.Ct. at 1019. General Laws c. 53, § 44, as it would be amended by House No. 5852, would attempt to override the State Democratic party's effort to ensure that regular party members have a substantial voice in the selection of its candidates for statewide office, and that, at least in conjunction with §§ 44, 46, and 37 of G.L. c. 53, is impermissible. If the law of the Commonwealth were to require that nomination papers be signed only by regular members

of the party, contrary to c. 53, § 46, or that only regular members of the party may vote in the primary, contrary to c. 53, § 44, as it would be amended by House No. 5852, would be less intrusive on a political party's constitutional rights. However, we express no opinion on whether it would be sufficiently less intrusive to be constitutionally sound, since that is not the question before us, nor need we consider whether any proviso of the Constitution of the Commonwealth might prohibit the proposed enactment.

(2) We answer question number 2, as interpreted by us above, as follows: If House No. 5852 were approved, G.L. c. 53, § 44, as thereby amended, would abridge the constitutional rights of the Democratic party and its members to associate by allowing candidates to be placed on the

Democratic State primary ballot in contravention of the party's charter.

The foregoing opinion is submitted by the Chief Justice and the Associate Justices subscribing hereto on the 23rd day of April, 1982.

EDWARD F. HENNESSEY
HERBERT P. WILKINS
PAUL J. LIACOS
RUTH I. ABRAMS
JOSEPH R. NOLAN
NEIL L. LYNCH
FRANCIS P. O'CONNOR

ORDER OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, SJC-2889, dated July 6, 1982, Frederick C. Langone, et al. v. Secretary of the Commonwealth, et al.

On June 18, 1982, the Single Justice reserved and reported the following questions of law presented by this action:

1. Whether all candidates who have complied with applicable statutory requirements must appear upon the Democratic state primary ballots, notwithstanding the failure to obtain at least fifteen percent of the vote on any ballot of the Democratic Convention pursuant to Article Six, Section III of the 'Charter of the Democratic Party of the Commonwealth?

2. Whether the decision by the Secretary of the Commonwealth that he will not place upon the Democratic state primary ballots those candidates who failed to

obtain at least fifteen percent of the vote on any ballot of the Democratic Convention pursuant to Article Six, Section III of the 'Charter of the Democratic Party of the Commonwealth,' but otherwise complied with the statutory requirements to have their names placed upon the ballots violated the constitutional or statutory rights of the voters, the candidates, or their supporters?

Upon consideration of the argument and briefs of the parties, we interpret the State statutes in light of the State and Federal constitutions and rule that the Secretary of State must give effect to the relevant charter provisions. Accordingly, we answer the questions reported, "no."

A rescript will issue forthwith with an opinion or opinions to follow.

ARTICLE SIX, SECTION III, OF THE CHARTER OF THE MASSACHUSETTS DEMOCRATIC PARTY, adopted at Convention of May 21-22, 1982.

There shall be a State Convention in even-numbered years for the purpose of endorsing candidates for statewide offices in those years in which such office is to be filled. Endorsements for statewide office of enrolled Democrats nominated at the Convention shall be by majority vote of the delegates present and voting, with the proviso that any nominee who receives at least 15 percent of the Convention vote on any ballot for a particular office may challenge the Convention endorsement in a State Primary Election.

HOUSE BILL NO. 5852 of the State Legislature of the Commonwealth of Massachusetts (1982).

An Act ensuring that candidates nominated by nomination papers shall have access to the state primary ballot.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section 44 of Chapter 53 of the General Laws, as amended by Chapter 136 of the Acts of 1977, is hereby further amended by adding after the first sentence the following sentence: -- Notwithstanding any party charter, rule or by-law, any candidate submitting nomination papers pursuant to this chapter shall be a candidate for nomination at the state primary.

84-1440

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NO._____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1984

ALWIN E. HOPFMANN, GREGORY HESSION,
CLARENCE PERKINS, CLARENCE PAULIN,
and BETH SULLIVAN,

Appellants,

v.

MICHAEL JOSEPH CONNOLLY,
FRANCIS X. BELLOTTI, CHESTER G. ATKINS,
and THE DEMOCRATIC STATE COMMITTEE OF
MASSACHUSETTS,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

Appendix, Vol.2

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14 pp

CONSTITUTIONAL AND STATUTORY PROVISIONS:

A. CONSTITUTIONAL PROVISIONS

Art. I, Sec. 3, Cl. 3:

No Person shall be a Senator who shall not have attained the Age of thirty years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

Art. I, Sec. 4, Cl. 1:

The Times Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of Chusing Senators.

First Amendment:

Congress shall make no law...abridging the freedom of speech,...or of the right of the people peacably to assemble, and to petition the government for a redress of grievances.

XIVth Amendment:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any personwithin its jurisdiction the equal protection of the laws.

XVIIth Amendment:

The Senate of the United States shall be composed of Two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

When vacancies happen in the representation of any State in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

STATUTES:

42 U.S.C. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or Territory, subjects, or causes to be subjected, any citizen of the United States or other person withn the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. 1652:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

2 U.S.C. 431(1):

The term "election" means--
***
(B) a convention ..of a political party which has authority to nominate a candidate.

2 U.S.C. 431(2):

The term "candidate" means an individual who seeks nomination for election...to Federal office...

2 U.S.C. 431 (3)

The term "Federal office" means the office of Senator ...in Congress..."

Mass. Acts 1973 c. 429:

Chap. 429 AN ACT REPEALING THE LAW PROVIDING FOR PRE-PRIMARY CONVENTIONS OF POLITICAL PARTIES.

Be it enacted, etc., as follows:

SECTION 1. Chapter 52 of the General Laws is hereby amended by striking out section 9, as most recently amended by

section 1 of chapter 920 of the acts of 1971, and inserting in place thereof the following section:--

Section 9. City and town committees, respectively, shall fix the number of members of ward and town committees to be elected at the presidential primaries,not less than three nor more than thirty-five for each ward and each town. Notice of the number of committee members to be elected shall be given by the city or town committeee, as the case may be, to the state secretary on or before the second Tuesday in January of the year in which such persons are to be elected. In case a city or towon committee fails to fix the number of members of a ward or town committee and to give such notice, the number of members of such ward or town committee to be elected shall not exceed ten.

SECTION 1A. The first sentence of section 2 of chapter 53 of the General Laws, as most recently amendedby section 1 of chapter 407 of the acts of 1966, is hereby amended by striking out, in lines 3 and 4, the words "and except as provided in section fifty-four,".

SECTION 2. Said chapter 53 is hereby amended by striking out section 5, as most recently amended by section 1 of chapter 56 f the ats of 1966, and inserting

in place thereof the following section:--

Section 5. Every certificate of nomination shall state such facts as are required by section eight and shall be signed and sworn to by the presiding officer and by the secretary of the caucus or convention, who shall add to their signatures their residences. The secretary shall within the seventy-two hours succeeding five oclock in the afternoon of the day upon which the caucus was held or the session of the convention terminated, and within the time specified in section ten, file such certificate at the place specified in section nine.

No such certificate of nomination, except for presidential electors, shall be received or be valid unless the written acceptance of the candidates thereby nominated shall be filed therewith.

SECTION 3. Said chapter 53 is hereby further amended by striking out section 34, as most recently amended by chapter 41 of the acts of 1970, and inserting in place therof the following section:--

Section 34. Atthe top of each ballot shall be printed the words "Official ballotof the (here shall follow the party name)". On the back of each ballot when folded shall be printed the same words, followed by the number of the precinct and ward or the name of the town for which the ballot is prepared, the date of the

primary and for state primaries a facsimile of the signatures of the city or town clerk. Names of candidates for each elective office shall be arranged alphabetically according to their surnames except as othewise provided.

Names of candidates for nomination for all offices to be voted for at a state primary of which they are the elected incumbents or the incumbents chosen by the senate and house of representatives, or appointed by the governor, or appointed by the justices of the supreme judicial or superior court, or appointed by the county commissioners and the clerk of the courts for a county, shall be placed first in alphabetical order and names of other candidates shall follow in like order.

Names of candidates for state committee who are either elected or appointed incumbents shall be placed first in alphabetical order, and names of other candidates for said office shall follow in like order.

Names of candidates for ward or town committees and for delegates to national conventions shall be arranged in groups in such order as may be determined by lot, under the direction of the state secretary, who shall notify each state committee and give a representative of each such committee an opportunity to present. When necessary, groups may be

printed on the ballot in two or more columns; provided, howeverthat only one heading designating the number of membesr to be elected to such committee or as delegates to such convention shall be printed.

Against the name of a candidate for an elective office, for delegate or alternate delegate to a national convention, for a ward or town committee, or for state committee, shall be printed the street and number, if any, of his residence.

Against the name of a candidate for an elective office shall be printed the statement contained in the nomination paper placing him in nomination, except where vacancies caused by death, withdrawal or physical disability are filled.

Except where vacancies caused by death, withdrawal or physical disability are filled, no names shall be printed on a ballot other than those presented on nomination papers. On ballots at city and town primaries, and preliminary elections except where city charters provide otherwise, names of candidates for offices of which they are elected incumbents, or the incumbents chosen by vote of the board of aldermen or city council in a city, or the incumbents chosen by joint convention of the board of aldermen or city council

and school committee, shall be placed first in alphabetical order according to their surnames, to be followed by the names of all other candidates for such offices in alphabetical order. Against the name of each such candidate there shall be printed, if the candidate requests, a statement in not more than eight words setting gorth the public offices which he holds or has held, showing clearly that he is a former incumbent thereof if such is the case and, if he is an elected incumbent of an office for which he seeks renomination, that he is a candidate for such renomination; and if he is a veteran, as defined in section twenty-one of chapter thirty-two, the word "veteran" may be used. Immediately following the names of candidates on ballots at city and town primaries, and prliminary elections except where city charters provide otherwise, blank spaces equal to the number of persons tobe chosen shall be provided for the insertion of other names. Immediately following the names of candidates on ballots at state and presidential primaries, where there are fewernames than there are persons to be chosen, blank spaces shall be provided, equal in number to the deficiency, for the insertion of other names.

The number of persons to be voted for the different offices shall be stated on

the ballot.

The form of ballots and the arrangement of printed matter thereon shall be in general the same as that of the official state ballots, except as otherwise provided in this chapter.

SECTION 4. Section 44 of said chapter 53 is hereby amended by striking out the first and second sentences and inserting in place thereof the following two sentences:--

The nomination of candidates for nomination at state primaries shall be by nomination papers. In the case of offices to be filled by all the voters of the commonweath[sic], nomination papers shall be signed in the aggregate by at least ten thousand voters.

SECTION 5. Sections fifty-four, fifty-four C and fifty-four D of said chapter fifty-three are hereby repealed.

(This bill, returned by the Governor, to the House of Representatives, the branch in which it had originated, with his objections thereto, was passed by the House of Representatives, June 19, 1973, and, in concurrence, by the Senate, June 19, 1973, the objections of the Governor notwithstanding, in the manner prescribed by the Constitution; and thereby has "the force of a law".)

Mass. Gen. Laws, Chapts. 53, 54,
Method of Nomination Papers:

Mass. Gen. Laws, Chapt. 53, Sec. 2:

...candidates of political parties for all

elective offices,...shall be elected, in primaries or caucuses,...All nominations and elections in primaries and caucuses shall be by direct plurality vote. No candidates shall be nominated, and no member of a political committee or coonvention delegate elected, in any other manner than is provided in this chapter....

Mass. Gen. Laws, Chapt. 53. Sec. 34:

Except where vacancies caused by death, withdrawal or physical disability are filled, no names shall be printed on a ballot other than those presented on nomination papers.

Mass. Gen Laws, Chapt. 53, Sec. 44:

The nomination of candidates for nomination at state primaries shall be by nomination papers. In the case of...United States senator, nomination papers shall be signed in the aggregate by at least ten thousand voters;

Mass. Gen. Laws, Chapt.54, Sec. 41:

Ballots for the use of voters in a voting precinct, polling place or town shall contain the names of all candidates duly

nominated for election therein,...

Place of "Chusing" of United States senators:

Mass. Gen. Laws, Chapt.53, Sec. 28:

State primaries shall be held on the seventh Tuesday preceding biennial state elections....
***
Except in Boston, primaries shall be held wholly or partly by wards, precincts or towns, as the aldermen or selectmen may designate.

Mass. Gen. Laws, Chapt. 54, Sec. 24:

The aldermen in cities, except where city charters provide otherwise, and the selectmen of towns divided into voting precincts, shall, twenty days at least before the biennial state...election..., designate the polling place for each voting precinct and cause it to be suitably fitted up and prepared therefor.

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No. 84-1440

In The
Supreme Court of the United States

October Term, 1984

Alwin E. Hopfmann, Gregory Hession, Clarence Perkins, Clarence Paulin and Beth Sullivan,
Appellants,
v.
Michael Joseph Connolly, Francis X. Bellotti, Chester G. Atkins, and the Democratic State Committee of Massachusetts,
Appellees.

On Appeal From The United States Court of Appeals For The First Circuit

---

Motion Of Respondents Connolly And Bellotti To Dismiss The Appeal Or To Affirm The Judgment Of The United States Court of Appeals For The First Circuit Or, In The Alternative, Brief In Opposition To The Petition For A Writ Of Certiorari

---

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BEST AVAILABLE COPY

I. QUESTIONS PRESENTED

1. Whether, in light of this Court's prior disposition of the issues in Bellotti v. Connolly, 460 U.S. 1057 (1983), a substantial federal question now exists concerning the validity of the Massachusetts statutory scheme for obtaining access to the state primary ballot under the First and Fourteenth Amendments to the United States Constitution.

2. Whether the Massachusetts statutory scheme for obtaining access to the state primary ballot violates Article One, Section Four of the United States Constitution.

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III. MOTION TO DISMISS OR TO AFFIRM THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Pursuant to Rule 16 of the Rules of this Court, respondents Connolly and Bellotti move that the appeal be dismissed or that the judgment of the United States Court of Appeals for the First Circuit be affirmed on the ground that it is plainly correct and the questions presented by the jurisdictional statement are so unsubstantial as not to warrant further argument.[1/]

1/ The appellants have sought to invoke the appellate jurisdiction of this Court pursuant to 28 U.S.C. §1254(2), claiming that a statute of the Commonwealth of Massachusetts has been declared repugnant to the Constitution of the United States by the Court of Appeals. The respondents, Connolly and Bellotti, respectfully submit that no state statute has been

IV. STATEMENT OF THE CASE

This action challenges both a party rule and the Massachusetts statutory scheme which incorporates it and which limits access of candidates for statewide office to the Democratic primary ballot. The appellant, a candidate for the Democratic nomination for the office of United States Senator in 1982, and four of his supporters primarily attack the constitutionality and validity of the

---

Footnote Continued:

1/ invalidated and therefore the appellate jurisdiction of this court has been improperly invoked. They, therefore, request that this submission be treated, in the alternative, as a Brief in Opposition to a Petition for a Writ of Certiorari.

so-called "15% Rule" [2/] of the Massachusetts Democratic Party. That rule which has essentially been incorporated into the state statutory scheme, requires candidates for statewide office to obtain at least 15% of the votes on any ballot at the state nominating convention. The rule was given effect by the State Secretary who refused to

---

2/ Article Six, Section III of the Charter of the Massachusetts Democratic Party was amended in 1979, so as to read in pertinent part: "Endorsements for statewide office of enrolled Democrats nominated at the Convention shall be by majority vote of the delegates present and voting, with the provision that any nominee who receives at least 15% of the convention vote on any ballot for a particular office may challenge the convention endorsement in a State Primary election."

This rule is commonly referred to as the "15% Rule."

place the names of any candidates for statewide office on the primary ballot who had failed to obtain the necessary convention vote.

The appellant, Mr. Hopfmann, failed to obtain 15% of the convention vote in 1982 and challenged the statutory scheme on several constitutional grounds. The United States District Court for the District of Massachusetts considered motions to dismiss filed by the various defendants and plaintiffs' motion for summary judgment. Judgment was granted in favor of all defendants with express reliance upon this Court's summary disposition of an earlier case which originally involved the present respondents on opposite sides of a dispute over the validity of the system at issue here.

Bellotti v. Connolly, 460 U.S. 1057 (1983). (App. Vol. 1 p. OB 35). An appeal was taken to the United States Court of Appeals for the First Circuit. On October 22, 1984 the judgment of the District Court was upheld in all respects. Hopfmann v. Connolly, 746 F.2d 97 (1984). The appellees now seek plenary review of the very issues which were before this Court just two years ago.

V. ARGUMENT

A. The Massachusetts Statutory Scheme Does Not Now Present Substantial Questions Concerning Its Consistency With The First And Fourteenth Amendments

The Massachusetts General Laws provide certain requirements concerning the nomination of candidates at primary elections. Candidates must be enrolled members of the party whose nomination they seek. Mass. Gen. Laws c.53, §48. To obtain a place on the primary ballot for nomination to a state-wide office, they must file 10,000 signatures of voters who are members of the party or who are not members of any other party. Mass. Gen. Laws c.53, §44. The actual nomination of the candidates must take place at a state primary election. Mass. Gen.

Laws c.53, §§ 2 and 41, but candidates may appear on the primary ballot of the Democratic Party only if they satisfy the 15% rule.

In a prior state proceeding it was first claimed that the only requirements for gaining access to the Democratic state primary ballot were those expressly set forth in the state statutes and that the party rule could not be invoked to exclude from the ballot candidate who had met those statutory criteria. Langone v. Secretary of the Commonwealth, 388 Mass. 185, 446 N.E. 2d 43 (1983). The Supreme Judicial Court rejected that argument and conclusively construed the Massachusetts statutory scheme as encompassing the 15% Rule of the state Democratic Party. "[W]e treat the Rule as though it were

expressly contained in Mass. Gen. Laws c.53". Langone, 388 Mass. at 195, 446 N.E. 2d at 48. That determination is simply not open to challenge; the highest court of a state is the final expositor of the meaning and operation of state law. Any construction or interpretation offered by the highest state court is binding upon any federal court construing the same statute. Kolender v. Lawson, 461 U.S. 352, 355-356 (1983); Schad v. Borough of Mount Ephraim, 452 U.S. 61, (1981). Brown v. Ohio, 432 U.S. 161, 168 (1977). The 1982 opinion of the Supreme Judicial Court of Massachusetts did not stop with an exposition of state law. The court went on to consider the constitutionality of the 15% Rule in a context identical to that presented by this appeal. The second claim advanced

by Mr. Langone, who like the current petitioner was thwarted in his effort to be on the ballot by application of the 15% rule, was that the 15% rule unconstitutionally restricted his right of access to the primary ballot.

The Supreme Judicial Court concluded that the 15% Rule did not impose a substantial burden on the exercise of the right of political association and that the statutory scheme need only be subject to a "rationality test." Langone, 388 Mass. at 197 446 N.E. 2d at 50. The court then concluded that the rule was rationally related to the goal of protecting the integrity of the political party by insuring that only candidates with a reasonable modicum of support from party members with substantial party affiliation emerge as the nominee for

important public offices. Langone 388 Mass. at 198 446 N.E. 2d at 47.

Appeals were taken from this decision to the United States Supreme Court.[3/] They were dimissed on April 4, 1983 for want of jurisdiction. Bellotti v. Connolly, 460 U.S. 1057 (1983).

The summary disposition of these appeals was deemed by the lower courts to be conclusive precedent on the issue raised by Mr. Hopfmann concerning his First and Fourteenth Amendment freedoms.

3/ Separate appeals were filed by Langone and Attorney General Bellotti, a current respondent. The arguments advanced then by the Attorney General were rejected and his appeal to this Court was dismissed for lack of jurisdiction. Bellotti v. Connolly, 460 U.S. 1057 (1983). Accordingly, the Attorney General has undertaken his customary representation of the State Secretary and the defense of state statutes as construed by the highest state court.

Both the District Court and the Court of Appeals for the First Circuit relied upon the summary disposition in rejecting Mr. Hopfmann's arguments.

The lower courts were correct in relying on the fact that this court has already decided that the 15% Rule does not constitute a denial or infringement on a candidate's or his supporters' right to vote or to associate for political purposes. It is therefore respectfully submitted that the argument raised by Mr. Hopfmann alleging that the 15% Rule unconstitutionally infringes on his right of political association has already been conclusively resolved and need not be addressed by the Court again.

B. <u>The Courts Below Correctly Found That The Massachusetts Statutory Scheme Does Not Violate Article One, Section Four of the United States Constitution.</u>

Mr. Hopfmann has raised a separate challenge to the 15% Rule based upon Article One, Section Four of the United States Constitution. He alleges that the constitution allows state legislatures to set the "time, place and manner" of elections, but that this provision does not allow the states to delegate this function to political parties.

This argument presents no substantial federal question, as it is based upon an overly restrictive interpretation of the word "legislature" as found in Article One, Section Four.

This Court has interpreted the term more broadly to include the entire state legislative process.

In the case of Smiley v. Holm, 285 U.S. 355 (1932), for instance, this Court held that in considering the meaning to be given the term "legislature" as used in the constitution it is "necessary to consider the nature of the particular action in view." Id. at 366. Based upon the broad purpose that the state legislatures were to serve in setting the "time, place and manner" of congressional elections, this Court concluded that the "exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments." Id. at 367-368.

Clearly Article One, Section Four allows the state to follow the usual course in enacting legislation governing federal elections. In Massachusetts, that legislation, as enacted by the General Court, is subject to interpretation by the Supreme Judicial Court and interpretations of state statutes offered by that court are binding to the meaning and operation of the statute.

The Massachusetts statutory scheme provides a comprehensive set of minimum requirements necessary to obtain primary ballot access. Langone v. Secretary of the Commonwealth, 388 Mass. 185, 446 N.E. 2d at 43 (1983). That statutory scheme accomodates and includes the 15% Rule of the Democratic Party. 388 Mass. at 194, 446 N.E. 2d at 51. The validity of the rule and the right of the party to add

to the statutory minimum set by state statute has been expressly upheld by the highest state court. There can now be no question that the Massachusetts statutory scheme includes the addition of the 15% Rule by the State Democratic Party. Langone, supra.

Mr. Hopfmann has argued that the delegation of such a legislative function to a political party is itself unconstitutional. This argument too, fails to present a substantial federal question and numerous cases from other jurisdictions have upheld the involvement of political parties in augmenting the statutory requirements for ballot access or in playing a direct role in the selection of party nominees. There is no split of authority between those jurisdictions. See Skeen v. Hooper, 631 F.2d

707 (10th Cir. 1980), Clark v. Rose, 379 F.Supp. 73 (S.D. N.Y. 1974), Tansley v. Grasso, 315 F.Supp. 513 (D. Conn. 1970), Yuratich v. Plaquemines Prish Democratic Executive Committee, 32 So.2d 647, (La. 1947).

It is clear that Massachusetts could have expressly made the 15% Rule part of the operable statutory scheme. The rule has been conclusively made part of the election process by the Langone decision. That interpretation, and the effect of that interpretation, are part of the Massachusetts legislative process. Accordingly, the 15% Rule has been promulgated and enforced pursuant to the state's power to establish the "time, place and manner" for conducting congressional elections.

VI. CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the First Circuit should be summarily affirmed and the respondents appeal dismissed. To the extent that the respondents pleading is treated as a Petition for a Writ of Certiorari, it should be denied.

Respectfully submitted,

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DATED: April 12, 1985

* Counsel of Record

CERTIFICATE OF SERVICE
UNDER RULE 28

I hereby certify that I am a member of the bar of this Court, and that I have served, three copies each, by Express Mail, postage prepaid, this 11th day of April, 1985, true and accurate copies of this Motion of Respondents Connolly and Bellotti To Dismiss the Appeal Or To Affirm The Judgment Of The United States Court of Appeals For The First Circuit, or in the alternative, Brief in Opposition To The Petition For A Writ of Certiorari upon Laurence A. Elgin, Esq., 2762 Woodley Place, N.W., Washington, D.C. 20008, Lawrence J. Ball, Esq., Ten Tremont Street, Boston, Massachusetts 02108, Fred Goldstein, Esq., 120 S. University Drive, Plantation, Florida 33324 and James F. Schoener, Esq., 2555 M Street, N.W., Washington, D.C., 20008 and Keith Long, Esq., Herrick and Smith, 100 Federal Street, Boston, Massachusetts 02110.

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NO. 84-1440

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

ALWIN E. HOPFMANN, GREGORY HESSION, CLARENCE PERKINS, CLARENCE PAULIN, and BETH SULLIVAN,

Appellants,

v.

MICHAEL JOSEPH CONNOLLY, FRANCIS X. BELLOTTI, CHESTER G. ATKINS and THE DEMOCRATIC STATE COMMITTEE OF MASSACHUSETTS

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

APPELLEES CHESTER G. ATKINS' AND DEMOCRATIC STATE COMMITTEE OF MASSACHUSETTS' MOTION TO DISMISS APPEAL AND TO AFFIRM JUDGMENT BELOW.

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QUESTIONS PRESENTED

1. Does this Court have appellate jurisdiction over this matter pursuant to 28 U.S.C. §1254(2) where the Court of Appeals upheld a state statutory scheme against an assertion that it was repugnant to the Constitution of the United States and where no substantial federal questions are presented?

2. Is Article Six, Section III of the Charter of the Massachusetts Democratic Party (the "15% Rule") 1/,

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1/ Article Six, Section III of the Charter of the Democratic Party for the Commonwealth of Massachusetts (the "15% Rule"), adopted at the party's 1979 Charter Convention, provides for party endorsement of candidates through the mechanism of an election year Endorsing Convention. Endorsements are made by a majority vote of the delegates

(Footnote Continued)

which has previously been reviewed and upheld by this Court against Constitutional challenge in the

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(Footnote Continuation)

1/ present and voting. However, candidates who, on any ballot, receive at least 15% of the votes cast at the Endorsing Convention for the office they seek and who otherwise meet the requirements of M.G.L. c. 53 may challenge that endorsement at the primary election. The candidate receiving a plurality of the votes cast at the Democratic primary becomes the Democratic nominee in the general election. M.G.L. c. 53, §2. The Massachusetts Supreme Judicial Court has construed the "15% Rule" as being incorporated into the state statutory scheme governing selection of the Democratic party nominees for statewide elective office. Langone v. Secretary of the Commonwealth, 388 Mass. 185, 446 N.E. 2d 443, app. dism'd. and cert. denied sub nom. Bellotti v. Connolly, 460 U.S. 1057 (1983). (The text of Article Six, Section III is attached to this Motion as Appendix A, and a copy of the Massachusetts Supreme Judicial Court's opinion in Langone is attached as Appendix B.

case of Bellotti v. Connolly, 460 U.S. 1057 (1983), repugnant to the Constitution of the United States insofar as it applies to candidates for the Massachusetts Democratic Party's nomination for the office of United States Senator?

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INTRODUCTION

Pursuant to Rule 16 of the Rules of this Court, appellees Chester G. Atkins (Chairman of the Massachusetts Democratic Party) and the Democratic State Committee of Massachusetts hereby move that the appellants' Appeal be dismissed and that the judgment of the United States Court of Appeals for the First Circuit be affirmed on the ground that it is plainly correct and the questions presented by the Jurisdictional Statement are so insubstantial as not to warrant further argument. Insofar as appellants' papers are treated as a Petition for Certiorari, these appellees oppose that Petition and request that this submission be treated in the alternative as a Brief in Opposition to the Petition.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the state statutory and federal Constitutional provisions cited by appellants, M.G.L. c. 52, §10; M.G.L. c. 53, §§6, 9, 37, 38, 46 and 48; M.G.L. c. 54, §§116 and 116A; and Article Six, Section III of the Charter of the Massachusetts Democratic Party were also involved in the decision below. The pertinent texts of these additional provisions of the state statutory scheme for nomination and election of candidates for state-wide office are set forth in Appendix A and Appendix E.

STATEMENT OF THE CASE

On June 4, 1982, appellants Alwin Hopfmann, a candidate for the Democratic Party nomination for the

office of United States Senator from Massachusetts, and registered voters Gregory Hession, Clarence Perkins, Clarence Paulin and Beth Sullivan ("appellants"), filed a five-count Complaint against defendants Michael G. Connolly, Secretary of the Commonwealth of Massachusetts; Francis X. Bellotti, Attorney General of the Commonwealth; Chester G. Atkins, Chairman of the Democratic State Committee of Massachusetts; and the Massachusetts Democratic State Committee ("appellees") in the United States District Court for the District of Massachusetts. Appellants' Complaint, challenging the validity and effect of the Massachusetts Democratic Party's "15% Rule" on federal and state constitutional and statutory

grounds sought declaratory and injunctive relief requiring Secretary Connolly to place Hopfmann's name on the September 14, 1982 Democratic Party state primary ballot as a candidate for the Democratic Party's nomination for the office of United States Senator.

On June 16, 1982, Attorney General Bellotti moved to dismiss or stay the proceedings below pending the decision of the Massachusetts Supreme Judicial Court in the related proceeding of Langone v. Secretary of the Commonwealth, SJC Case No. 82-214. 2/

2/ Langone v. Secretary of the Commonwealth was decided on July 9, 1982 and the Supreme Judicial Court's opinion in that case was later reported at 388 Mass. 185, 446 N.E.2d 443 (1983) [Appendix B].

That motion was granted on June 21. On June 22, 1982, at appellants' request, the District Court directed that a three-judge court be convened to hear and decide appellants' claims under the Voting Rights Act, 42 U.S.C. §§1973, et seq., concurrently with the District Court's consideration of appellants' other claims. On June 24, 1982, Atkins and the Committee filed answers as well as a motion to dismiss. On June 30, 1982, Secretary Connolly likewise filed an answer and a motion to dismiss.

On June 29, 1982, appellants filed a motion for a temporary injunction requiring Secretary Connolly to place Hopfmann's name on the Democratic primary ballot. After briefing by all parties, oral argument,

and the submission of the Statement of Agreed Facts from Langone v. Secretary of the Commonwealth, supra, the three-judge panel and the District Court below (as single judge) both denied the appellants' motion on the ground that appellants did not have the requisite "reasonable prospect of success" on any of their claims. Hopfmann, et al. v. Connolly, et al., Civil Action No. 82-1530-Mc, Memoranda and Orders entered July 7, 1982. On July 8, 1982, appellants filed an application in this Court seeking a stay of these denials of preliminary relief and an order directing Secretary Connolly to place Hopfmann's name on the Democratic primary ballot. That application was denied by Justice Brennan on July 8, 1982 and, after resubmittal by appellants, denied by Justice Rehnquist

on July 9, 1982. Hopfmann, et al. v. Connolly, et al., United States Supreme Court, Case No. A-18 (1982).

On September 20, 1982, appellants filed a petition for writ of habeas corpus in this Court requesting that Hopfmann's name be placed on the Democratic primary ballot. That petition was denied by the full Court on October 18, 1982. In re Hopfmann, United States Supreme Court, Case No. 82-488, 51 U.S.L.W. 3298 (1982). On September 30, 1982, appellants filed a petition for writ of prohibition and/or mandamus and/or injunction in this Court, once again requesting that Hopfmann's name be placed on the Democratic primary ballot. That petition was denied by this Court on November 29, 1982. In re Hopfmann, United States Supreme Court, Case No.

82-610, 51 U.S.L.W. 3403 (1982). On October 25, 1982, appellants filed an application in this Court seeking a stay of the general election or, in the alternative, a special primary election, which was denied by Justice Brennan on October 26, 1982, and, after resubmittal, again denied, this time by the full Court, on November 1, 1982. In re Hopfmann, United States Supreme Court, Case No. 82-610 (A-388), 51 U.S.L.W. 3339 (1982). Appellants' applications to this Court to enjoin the Governor of Massachusetts from certifying the election of Senator Edward M. Kennedy and the United States Senate from seating him were denied by this Court on November 5, 1982. In re Hopfmann, United States Supreme Court, Case No. 82-610 (1982). On September 30, 1982, the District Court

denied appellees' renewed motions to dismiss, without prejudice to their renewal at a later date in light of developments in other courts. 3/ On October 26, 1982, appellants filed a renewed motion for preliminary relief in the District Court and, on November 3, 1982, a motion for summary judgment.

A copy of the opinion of the Massachusetts Supreme Judicial Court in the related case of Langone v. Secretary of The Commonwealth, 388 Mass. 185, 446 N.E.2d 43 (1983), was filed with the District Court on February 23, 1983, and a copy of this Court's

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3/ An appeal from the Supreme Judicial Court's July 9, 1982 decision in Langone v. Secretary of the Commonwealth, supra, was then pending in this Court. This Court later dismissed that appeal for failure to present any substantial federal questions. Bellotti v. Connolly, 460 U.S. 1057 (1983).

dismissal of the appeal and denial of the alternative petitions for certiorari in that case (Bellotti v. Connolly, 460 U.S. 1057 (1983)), was filed with the District Court on April 8, 1983. Shortly thereafter, appellees Atkins, Secretary Connolly and the Committee filed renewed motions to dismiss.

On February 9, 1984, appellants Hopfmann and Sullivan filed a new action in the District Court below seeking to have the "15% Rule" applied to all candidates for statewide political office and for President of the United States, regardless of party affiliation. Hopfmann, et al. v. Connolly, et al., Civil Action No. 84-393-Mc. Defendants in that case moved to dismiss the Complaint.

On April 9, 1984, deciding both cases together and treating

appellees' motions to dismiss as motions for summary judgment, the District Court granted appellees' motions and dismissed both of appellants' Complaints. Hopfmann, et al. v. Connolly, et al., Civil Action No. 82-1530-Mc. Appellants then appealed this case to the First Circuit Court of Appeals. The District Court's judgment in Civil Action No. 84-393-Mc was not appealed. On October 22, 1984 the First Circuit affirmed the judgment of the District Court. Hopfmann v. Connolly, 746 F.2d 97 (1st Cir. 1984). Appellants' petition for rehearing was denied by the full bench of the First Circuit on December 10, 1984. Appellants' Notice of Appeal to this Court was filed on March 8, 1985 and their Jurisdictional Statement on March 11.

STATEMENT OF THE FACTS

By statute, the winner by a plurality of the votes cast in the Democratic primary becomes the Democratic Party nominee at the general election. M.G.L. c. 53, §2. Also by statute, voting at the Democratic primary is open not only to enrolled party members, but also to unenrolled or independent voters who declare themselves "Democrats" at the polls just before receiving ballots. M.G.L. c. 53, §37. 4/. These voters may then cancel or change their party registration at the polling places immediately after voting. M.G.L. c. 53, §38. Thus, it is possible for a voter to be only a one-time "primary day Democrat" and have

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4/ As of February 1980, 39.9% of all registered Massachusetts voters were unenrolled. Opinion of the Justices, 385 Mass. 1201, 1205, 434 N.E.2d 960, 962 (fn. 1) (1982).

no other affiliation or desire for affiliation with the Democratic Party. Langone v. Secretary of the Commonwealth, 388 Mass. 185, 193, 446 N.E.2d 43, 47 (1983).

Candidates seeking to have their names placed on the Democratic primary ballot for statewide office must satisfy several statutory requirements. The candidate must be an enrolled Democrat, M.G.L. c. 53, §48; file a financial disclosure form with the State Ethics Commission, M.G.L. c. 53, §9; submit nomination papers signed by at least 10,000 registered voters who can be either Democrats or independents, M.G.L. c. 53, §44, M.G.L. c. 53, §46; and comply with all party rules governing primary ballot access that neither defeat the purpose of a primary election nor violate the constitutional

rights of candidates or voters. Langone, supra, 388 Mass. at 194, 446 N.E.2d at 48. As observed by the Massachusetts Supreme Judicial Court, absent the "15% Rule", nothing in the statutory scheme would prevent a candidate who lacked the support of a single registered Democrat from being placed on the Democratic primary ballot and, notwithstanding little or no support from the regular party membership, from potentially becoming the Democratic Party candidate in the general election. Langone, supra, 388 Mass. at 191, 446 N.E.2d at 46.

Concerned with the decline of the party's organizational effectiveness and, in particular, with the fact that the then-existing statutory scheme allowed a candidate who did not share the party's ideals, had no intention of

furthering those ideals if elected, and had no party accountability, to run for office as the official Democratic Party nominee, the Democratic Party in 1977 appointed a Commission to draft a proposed state party Charter. The Commission held seven public meetings across the Commonwealth and, in the spring of 1979, submitted a proposed Charter to a specially convened Charter Convention. The delegates to the Charter Convention were elected at caucuses on March 24, 1979, conducted in every ward and town in the Commonwealth. All registered Democrats were eligible to take part in those caucuses, which were conducted on a "one Democrat, one vote" basis, and approximately 30,000 party members so participated.

A key provision of the Charter

proposed by the Commission concerned the procedure by which the party would choose its nominees for statewide office. Following the model so successfully used (and upheld) in Connecticut, see Tansley v. Grasso, 315 F.Supp. 513 (D.Conn. 1970) (three judge court, the Commission recommended that party nominees for statewide office be selected by a two-pronged procedure involving convention endorsement and the primary election. This procedure was set forth in Article Six, Section III, of the proposed Charter. Under this initially proposed version of Article Six, Section III, an Endorsing Convention, to be held in statewide election years, would, by majority vote, formally endorse one candidate for each statewide office. However, the Convention "endorsement" of a candidate

could be challenged at the state party primary by any and all other candidates, otherwise qualified under state law, who, on any Convention ballot, received at least 20% of the votes cast for that office. The party would thus be assured that its ultimate nominee had demonstrated at least a minimal degree of support from the regular party membership, in addition to the broad appeal to all voters who consider themselves Democrats which is needed to win the primary election. At the same time, the rights of significant minorities in the Party would be protected by their candidates being able to take their case directly to the primary voters through the "challenge" procedure, thus ensuring an open and democratic choice.

The Charter Convention debated

Article Six, Section III -- including its proposed "20%" requirement -- and, at the November 1979 continuation of the Convention, adopted the overall procedure of convention endorsement and primary selection, but struck a slightly different balance. The requirement that a candidate desiring to run in the primary obtain at least 20% of the votes for the office sought on any ballot at the Endorsing Convention was reduced to 15% of any such vote. The "15% Rule", as it came to be known, was then adopted by a roll-call vote of over two-thirds of the voting delegates. The overall Charter, as amended, was likewise adopted by an over two-thirds roll-call vote.

Under the terms of the Charter, any of its provisions could be amended at any State Convention by

majority vote. Article Six, Section III and its "15% Rule" were reaffirmed at the Party's April 11, 1981 Issues Convention and, in December, 1981, the Party issued its "Preliminary Call to Convention" which gave clear notice that the Party would be holding its 1982 Endorsing Convention pursuant to Article Six. Langone, supra, 388 Mass. at 198, 446 N.E.2d at 50 (fn.6).

Any candidate, including Hopfmann, who was dissatisfied with the "15% Rule" could have declared himself an "unenrolled" candidate and attempted to qualify for the general election ballot as an independent at any time prior to February 4, 1982. M.G.L. c. 53, §6. Likewise, any such candidate was free at all times to conduct a "write in" campaign for the general election. M.G.L. c.54 §§116, 116A.

Hopfmann pursued neither option.

On February 6, 1982, delegates to the 1982 Endorsing Convention were elected on a "one Democrat, one vote" basis at caucuses conducted in every ward and town throughout Massachusetts. Persons registered as Democrats prior to December 31, 1981, were eligible to take part in those February 6 caucuses and approximately 100,000 Democrats so participated. The Endorsing Convention was duly held on May 21-22, 1982, and candidates were endorsed for every statewide office. Two amendments seeking either to repeal Article Six, Section III or postpone its effective date until January 1, 1983, were presented, debated and overwhelmingly defeated. Michael Dukakis was endorsed for Governor, Evelyn Murphy for Lieutenant Governor, and Edward Kennedy

for United States Senator. Both of the candidates for the Party's nomination for Governor, five of the seven candidates for the Party's nomination for the Lieutenant Governorship, and one of the two candidates for the Party's nomination for United States Senator, received at least 15% of the Convention votes on one or more ballots for that office and were thus eligible to run in the primary. Hopfmann did not receive 15% of the Convention vote on any ballot for the office of Senator and, consequently, was ineligible. In accordance with the guidance provided by an advisory opinion of the Massachusetts Supreme Judicial Court, Opinion of the Justices, 385 Mass. 1201, 434 N.E.2d 960 (1982), Secretary Connolly did not print Hopfmann's name on the Democratic primary ballot.

The Democratic primary was duly held on September 14 and the General Election on November 2, 1982.

SUMMARY OF ARGUMENT

Because the First Circuit upheld a state statutory scheme against federal constitutional attack, and because appellants have presented no substantial federal questions to this Court, appellants' appeal must be dismissed for want of jurisdiction. To the extent their papers are treated as a petition for certiorari, that petition should be denied for lack of merit.

In its comprehensive and well-reasoned unanimous opinion in Langone v. Secretary of the Commonwealth, 388 Mass. 185, 446 N.E.2d. 43, app. dism'd. and cert. denied sub nom. Bellotti v. Connolly, 460 U.S. 1057 (1983), the Massachusetts Supreme

Judicial Court, affirmed by this Court, conclusively resolved all but two of the arguments which appellants now bring to this Court. Specifically, the Supreme Judicial Court held that the "15% Rule" was a lawful exercise of the Democratic Party's constitutionally protected right of association; that it was a valid addition to the statutory requirements of M.G.L. c. 53 and was to be enforced by the state as part of that statutory scheme; and that it did not infringe any of the First or Fourteenth Amendment rights of candidates or their supporters. The correctness of these rulings, each directly applicable to appellants' claims in this appeal, was demonstrated by this Court's 6-3 decision dismissing the Langone plaintiffs' appeal "for want of jurisdiction", i.e. for want of a

substantial federal question. Bellotti v. Connolly 460 U.S. 1057 (1983). A dismissal of an appeal for want of a substantial federal question is a decision on the merits -- an affirmance of the correctness of the lower court's decision. Hicks v. Miranda, 422 U.S. 332, 343-44 (1974). As such, this Court's decision in Bellotti is dispositive of appellants' First and Fourteenth Amendment claims.

The Supreme Judicial Court's holding in Lanqone, supra, construing M.G.L. c. 53 as a matter of state law, likewise conclusively resolves appellants' Article I, §4 and appellate jurisdictional arguments against them. Under Article I, §4, the "legislature" of a state -- held by this Court to mean the entire state law-making process as construed by that state, Smiley v. Holm,

285 U.S. 355 (1932) -- may regulate the "time, place, and manner" of elections for the office of United States Senator. The state lawmaking process may constitutionally include political party rules and procedures so long as the party rules so adopted do not otherwise infringe a candidate's constitutional rights. Clark v. Rose, 379 F.Supp. 73 (S.D.N.Y. 1974) (three judge court), aff'd. 531 F.2d 56 (2d. Cir. 1976). See also Harris v. Conradi, 675 F.2d 1212, 1216 (11th Cir. 1982). As the Massachusetts Supreme Judicial Court ruled in Langone, the Massachusetts statutory scheme includes the "15% Rule". Langone, supra, 388 Mass. at 195-96; 446 N.E.2d at 48-49. This Court is bound by the Supreme Judicial Court's interpretation of the meaning of Massachusetts statutes.

Kolender v. Lawson, 461 U.S. 352 (1983); Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981); Brown v. Ohio, 432 U.S. 161, 168 (1977). Because the First Circuit upheld this state statutory scheme as conclusively interpreted by the state's highest court against appellants' federal constitutional attack, no appeal lies to this Court under 28 U.S.C. §1254(2).

Appellants' two remaining arguments, that the "15% Rule" violates Article I, §3 of the United States Constitution and/or the Seventeenth Amendment, are likewise without merit. Contrary to appellants' assertions, the "15% Rule" does not add any "qualification" to those enumerated in Article I, §3; it merely states an eligibility requirement for candidates who seek the Democratic Party's

nomination for that office. A candidate may be elected to that office without being the Democratic Party nominee, and thus not subject to the "15% Rule", by running as an independent, as the candidate of another party, or by waging a successful "write-in" campaign. Langone, supra, 388 Mass. at 197-98, 446 N.E.2d at 50-51. For the same reasons, appellants' Seventeenth Amendment argument fails. The "15% Rule" does not change the "qualifications" of voters for the office of United States Senator or "dilute" their votes in any way. It applies equally to each Democratic party candidate for state-wide office; and every such candidate has a precisely equal opportunity to obtain delegate support.

ARGUMENT

I. BECAUSE THE COURT OF APPEALS UPHELD A STATE STATUTORY SCHEME AGAINST CONSTITUTIONAL ATTACK, NO APPEAL LIES TO THIS COURT UNDER 28 U.S.C. §1254(2).

Under 28 U.S.C. §1254(2), this Court has appellate jurisdiction over rulings of the Circuit Courts of Appeal only where the party appealing relied on a state statute held by the Court of Appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States. Such is not the case here; indeed, the truth is quite the opposite. Contrary to appellants' arguments, in upholding the "15% Rule" -- which the Massachusetts Supreme Judicial Court has explicitly held to be part of the state statutory scheme for nominating state-wide Democratic candidates, Langone v. Secretary of Commonwealth, supra -- the First Circuit

upheld the state statutory scheme against appellants' Constitutional attack. The Supreme Judicial Court is the "final judicial arbiter" of the meaning of Massachusetts statutes, and its rulings on such questions are binding on this Court. Kolender v. Lawson, 461 U.S. 352 (1983); Schad v. Bureau of Mount Ephraim, 452 U.S. 61 (1982); Brown v. Ohio, 432 U.S. 161, 168 (1977).

The ruling of the Court below thus upheld a state statutory scheme against appellants' allegation that that scheme was repugnant to the United States Constitution. No appeal lies from such a determination under 28 U.S. §1254(2).

II. WHATEVER FEDERAL QUESTIONS ARE PRESENTED BY THIS APPEAL ARE INSUBSTANTIAL AND WERE CORRECTLY DECIDED BY THE COURT BELOW.

A. Appellants' Arguments That The "15% Rule" Violates The First And Fourteenth Amendments And Article 1, §4 Of The United States Constitution Have Been Conclusively Resolved Against Them By The Decisions Of The Massachusetts Supreme Judicial Court And This Court In Langone v. Secretary Of The Commonwealth.

Two of the arguments which appellants attempt to assert in this appeal -- that the Massachusetts Democratic Party had no constitutionally protected right to adopt the "15% Rule", and that appellants' First and Fourteenth Amendment rights were infringed by enforcement of the Rule -- have already been reviewed and rejected on their merits by this Court in the related case of Langone v. Secretary of the Commonwealth, 388 Mass. 185, 446

N.E.2d 443, app. dism'd. and cert. denied sub nom. Bellotti v. Connolly, 460 U.S. 1057 (1983), and appellants' further argument based on Article 1, §4 has been conclusively resolved against them by the Massachusetts Supreme Judicial Court's interpretation of M.G.L. c. 53, as set forth in the Lanqone case. Appellants' arguments on those issues are thus without merit.

(i) The "15% Rule" Is a Lawful Exercise of the Party's Constitutionally Protected Right of Association.

In their Jurisdictional Statement, appellants argue that the Massachusetts Democratic Party had no constitutionally protected right to adopt the "15% Rule". That argument has conclusively been rejected by this Court in its 6-3 decision dismissing the appeal in the related case of Bellotti

v. Connolly, supra. In the Bellotti case, the Bellotti plaintiffs challenged the "15% Rule" on precisely the same grounds asserted by appellants here - that the Democratic Party had no First Amendment right of association justifying its adoption of the "15% Rule". Appellants' argument is not only wrong; given this Court's opinion in Bellotti, it is frivolous.

Even prior to its decision in Bellotti, the fundamental right of political parties to establish candidate selection procedures was repeatedly recognized by this Court. Rodriquez v. Popular Democratic Party, 457 U.S. 1, 14 (1982); Democratic Party v. Wisconsin, 450 U.S. 107, 122-24 (1981); Cousins v. Wigoda, 419 U.S. 477, 491 (1975); and Ray v. Blair, 343 U.S. 214 (1952). As noted by the Massachusetts Supreme

Judicial Court in its April 1982 advisory opinion regarding the "15% Rule":

> A determination of who will appear on a general election ballot as a candidate endorsed by an identified political party is a critical decision for that party. The party, therefore, has a substantial interest implicit in its freedom of association to ensure that party members have an effective role in that decision.

Opinion of the Justices, 385 Mass. 1201, 1204, 434 N.E.2d 960, 962 (1982).

This Court, time and again, has recognized the Constitutional right of a political party to protect its candidate selection process from undue influence by persons who are, at best, "election day" party members or who are not party members at all. See Rodriquez v. Popular Democratic Party, supra; Democratic Party v. Wisconsin, supra; Cousins v. Wigoda, supra; and Ray v.

Blair, supra. See also, Abrams v. Reno, 452 F.Supp. 1166 (S.D. Fla. 1978) aff'd. 649 F.2d 342 (5th Cir. 1981), cert. denied 455 U.S. 1016 (1982); Developments in the Law: Elections, 88 Harv. L. Rev. 1111, 1210 (1975). These principles were correctly applied by the Court below.

(ii) The "15% Rule" Does Not Violate Article I, §4 Of The United States Constitution.

Article I, §4 of the United States Constitution is an affirmative grant of power to the states and not, by itself, a limit on the power of states to regulate elections or to delegate aspects of the candidate selection process to political parties. The term "legislature" in Article I, §4 refers to the entire state lawmaking process as construed by that state. Smiley v.

Holm, 285 U.S. 355 (1932); Davis v. Hildebrant, 241 U.S. 565 (1961). As held by the Massachusetts Supreme Judicial Court, the "15% Rule" is a lawful delegation of power by the Massachusetts General Court to the Democratic Party and, as such, a part of the state lawmaking process. Langone, supra, 388 Mass. at 194, 446 N.E.2d at 48. Such a delegation by the state is sanctioned by Article I, §4. Clark v. Rose, 379 F.Supp. 73, 77 (S.D.N.Y. 1974) (three judge court) aff'd. 531 F.2d 56 (2nd Cir. 1976). See also Harris v. Conradi, 675 F.2d 1212 (11th Cir. 1982); Tansley v. Grasso, 315 F.Supp. 513 (D. Conn. 1970) (three-judge court) (upholding similar delegation by Connecticut to political parties).

(iii) The "15% Rule" Does Not Infringe Any Of The Appellants' First Or Fourteenth Amendment Rights.

As held by the Massachusetts Supreme Judicial Court and this Court in Langone, supra, the "15% Rule" does not infringe any of the appellants' First or Fourteenth Amendment rights.

A candidate has no fundamental constitutional right to run in a party primary and, potentially, to become that party's nominee. Clements v. Fashing, 457 U.S. 957, reh. denied 458 U.S. 1133 (1982); Bullock v. Carter, 405 U.S. 134, 142-43 (1972); Walker v. Yucht, 352 F.Supp. 85, 97 (D. Del. 1972) (three-judge court); Developments in the Law: Elections, 88 Harv.L.Rev. 1111, 1176 (1975). Similarly, a voter does not have the constitutional right to

expect that a candidate to his liking will be on the ballot. Lubin v. Panish, 415 U.S. 709, 716 (1974); Walker v. Yucht, supra at 92.

Both the state and political parties may constitutionally put reasonable restrictions upon access to primary ballots and, so long as all candidates are equally subject to those requirements and have an equal opportunity to meet them, no constitutional rights of the candidates or their supporters are infringed. Clements v. Fashing, supra (inquiry is whether the challenged restriction unfairly or unnecessarily burdens the availability of political opportunity). See generally Developments in the Law: Elections, 88 Harv.L.Rev. 1111, 1176-77 (1975).

The "15% Rule" has, at most, an insignificant impact on appellants' constitutional rights. It does not discriminate against a discrete minority group. It does not involve a classification based on wealth. Nor does it impose a burden on new or small political parties or independent candidates. Thus, it is not subject to "strict scrutiny", and need only bear a rational relationship to a legitimate party goal. Clements v. Fashing, 457 U.S. 957, reh. denied 458 U.S. 1133 (1982); Clough v. Guzzi, 416 F.Supp. 1057, 1066-68 (D. Mass. 1976) (three-judge court); Nader v. Schaffer, 417 F.Supp. 837, 948-49 (D. Conn. 1976) (three-judge court) aff'd 429 U.S. 989 (1976); Walker v. Yucht, 352 F.Supp. 85

(D. Del. 1972) (three-judge court). This it clearly does. 5/.

Ballot access schemes far more restrictive than those imposed by the "15% Rule" have been upheld against constitutional challenge many times, the closest case being Tansley v. Grasso, 315 F.Supp. 513 (D. Conn. 1970) (three-judge court) in which the constitutional validity of Connecticut's statutory requirement that a prospective candidate receive the support of at least twenty percent of the delegate vote in a party convention, on any

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5/ The "15% Rule", in fact, serves the compelling party interest of assuring party members an effective role in the selection of their party's nominee, Langone, supra, 388 Mass. at 193, 446 N.E.2d at 47, and is thus constitutionally permissible even under the "strict scrutiny" standard of review. See Storer v. Brown, 415 U.S. 724 (1974).

roll-call vote, in order to qualify to run in the party primary, was unanimously upheld by the court. See also Storer v. Brown, 415 U.S. 724 (1974); Jenness v. Fortson, 403 U.S. 431 (1971); and Rosario v. Rockefeller, 410 U.S. 752 (1973).

Political parties have interests parallel to those of the states, and reasonable means employed by them in furtherance of those interests which, if used by the state would be constitutionally permissible, are likewise constitutional. Restivo v. Conservative Party, 391 F.Supp. 813 (S.D.N.Y. 1975); Clark v. Rose, 379 F.Supp. 73 (S.D.N.Y. 1974) (three-judge court), aff'd. 531 F.2d 56 (2nd Cir. 1976). Indeed, a political party's regulation of ballot access is accorded

far more deference than that of a state. As noted by the court in Ripon Society, Inc. v. National Republican Party, 525 F.2d 567 (D.C. Cir. 1975) (en banc), cert. denied 424 U.S. 933 (1976):

> The [party's] primary purpose is to chart a course for the advancement of the party's ideals and it is in that light that the requirements of equal protection are to be discerned.

525 F.2d at 585, n.58. See also Bode v. National Democratic Party, 452 F.2d 1302 (D.C. Cir. 1971), cert. denied 404 U.S. 1019 (1972); Moritt v. Rockefeller, 346 F.Supp. 34, 38 (S.D.N.Y. 1972) (three-judge court), aff'd. 409 U.S. 1020 (1972).

As noted above, five of the seven candidates who submitted their names to the Massachusetts Democratic Party's Endorsing Convention for the

nomination to office of lieutenant governor, one of the two candidates for the Senate race, and both candidates for the gubernatorial nomination received sufficient votes to qualify for the primary. Thus, the reasonableness of the "15% Rule", and the minimal nature of its requirements, are manifest. Langone, supra, 388 Mass. at 197, 446 N.E.2d at 49.

Finally, when evaluating any of the appellants' constitutional claims (including their Art. I, §3 and Seventeenth Amendment allegations), it is important to remember that ways other than the Democratic Party nomination exist for a candidate to get his or her name on the special election ballot. Hopfmann had the opportunity at any time up until February 4, 1982 to withdraw

from the Democratic Party, declare himself an independent candidate, and enlist his supporters in an attempt to secure sufficient signatures on petitions to qualify for the November ballot. M.G.L. c.53, §6. Hopfmann's supporters retained the right to "write in" Hopfmann's name on the November election ballot, and to support other candidates who reflected their political views. M.G.L. c. 54, §§116 and 116A.

At root, under the guise of alleged "constitutional violations", appellants are asking this Court to order the Democratic Party potentially to endorse a candidate who has not satisfied the party rules and has now chosen to challenge the wishes of a majority of its regular party members. If there are constitutional rights

severely at risk, they are those of the regular Democratic Party members who, should this Court invalidate the "15% Rule", may potentially be represented in a general election by a candidate who has no significant support in the active party membership. Hopfmann chose to stay in the Democratic Party rather than become an independent. Having made that choice, he should be required to abide by the "15% Rule."

B. Appellants' Remaining Arguments are Likewise Without Merit.

(i) The "15% Rule" Does Not Add Any "Qualification" To Those Enumerated In Article I, §3 Of The United States Constitution And Thus Does Not Violate Its Provisions.

In their Jurisdictional Statement, appellants mischaracterize the "15% Rule" as a "qualification"

prohibited by Article I, §3. It is not. It is solely a rule setting a minimal restriction on who may run in the Democratic Party primary for statewide political office and potentially become the party nominee. The distinction is a critical and decisive one.

The "15% Rule" in no way renders a candidate ineligible for the office of United States Senator. He or she is free to run as an independent, a "write in" candidate, or as the candidate of another political party and, if elected and if he or she meets the "qualifications" set forth in Article I, §3, will be fully "qualified" to take office despite his or her failure to comply with the "15% Rule". A prohibited "qualification" is

something entirely different; such a "qualification" would render a candidate completely ineligible to take office even if elected by write-in vote. This critical distinction is highlighted in State v. Crane, 197 P.2d 864 (Wyo. 1948). In that case, at pages 870-71, the Wyoming Supreme Court correctly notes that the test as to whether or not a "restriction" amounts to a "qualification" within the meaning of Article I, §3 is whether or not the candidate "could be elected if his name were written in by a sufficient number of electors." 197 P.2d at 871.

If appellants' reading of Article I, §3 was correct, no ballot restriction for the office of United States Senator would be constitutionally valid. Under appellants' interpretation

of Article I, §3, for example, Massachusetts could not constitutionally require that a candidate for major party nomination for the office of United States Senator must be a member of that party, M.G.L. c. 53, §48; file a financial disclosure form with the state Ethics Commission, M.G.L. c. 53, §9; and submit nominating papers signed by at least 10,000 registered voters, M.G.L. c. 53, §§44, 46. Appellants' interpretation also ignores the rulings of the United States Supreme Court in such cases as Storer v. Brown, 415 U.S. 724 (1974), Jenness v. Fortson, 403 U.S. 431 (1971) and Rosario v. Rockefeller, 410 U.S. 752 (1973), all of which review and uphold ballot access restrictions over and above the "qualifications" set forth in Article I, §3.

(ii) The "15% Rule" Does Not Violate The Seventeenth Amendment.

Appellants' last argument, based on the Seventeenth Amendment, appeared for the first time in this litigation in their brief submitted to the First Circuit.

The Seventeenth Amendment, in relevant part, states:

> The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

In no way does the "15% Rule" infringe this Amendment.

At the caucuses which choose delegates to its Endorsing Conventions, the Democratic Party employs precisely the same voter qualifications as does the state, with only one exception; participants at the caucuses must be registered Democrats. Every candidate

who desires the Democratic Party's nomination has precisely the same opportunity to get his supporters to those caucuses and, after the caucuses elect delegates to the Endorsing Convention, to solicit those delegates' votes. Moreover, as noted at several points in this Motion, any candidate for the office of United States Senator dissatisfied with the "15% Rule" has the opportunity to run as the candidate of another party, as an independent, or to conduct a "write-in" campaign. The qualifications of voters at the general election are not affected by the "15% Rule", nor are their votes "diluted", and all candidates, regardless of what party nomination they bear (if any), have precisely the same chance before precisely the same voters. Appellants'

argument to the contrary, Massachusetts is not a "one-party state" in which nomination by the Democratic Party is tantamount to election. Thus, appellants' belated Seventeenth Amendment arguments must be rejected.

III. CONCLUSION.

The validity of the "15% Rule" and its importance to the Democratic Party have been repeatedly upheld by the Massachusetts Supreme Judicial Court, the courts below, and by this Court. For all of the foregoing reasons, appellees Chester G. Atkins and the Democratic State Committee respectfully request that this Court affirm the judgment of the Court below and dismiss appellants' appeal for want of jurisdiction. To the extent appellants' papers are treated as a Petition for

Certiorari, appellees respectfully request that that Petition be denied.

CHESTER G. ATKINS and THE DEMOCRATIC STATE COMMITTEE OF MASSACHUSETTS

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CERTIFICATE OF SERVICE
UNDER RULE 28

I, Keith C. Long, counsel of record for appellees Chester G. Atkins and The Democratic State Committee of Massachusetts, do hereby certify that I am a member of the bar of this Court, and that I have served three true and accurate copies of this Motion on each of the other parties to this appeal by delivery to their counsel of record in the following manner:

By Federal Express (overnight delivery), all charges prepaid, upon Laurence A. Elgin, Esq., 2762 Woodley Place, N.W., Washington, D.C. 20008 (counsel of record for appellants).

By First Class Mail, all charges prepaid, upon Thomas R. Kiley, Esq., First Assistant Attorney General, Office of the Attorney General, One Ashburton Place, Room 2001, Boston, MA 02108.

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CLERK

NO. 84-1440

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1984

ALWIN E. HOPFMANN, GREGORY HESSION,
CLARENCE PERKINS, CLARENCE PAULIN,
and BETH SULLIVAN,

Appellants,

v.

MICHAEL JOSEPH CONNOLLY,
FRANCIS X. BELLOTTI, CHESTER G. ATKINS,
THE DEMOCRATIC STATE COMMITTEE OF
MASSACHUSETTS,

Appellees.

APPEAL FROM THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

Brief in Opposition to Motion to Dismiss
or Affirm of Connolly and Bellotti.

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CORRECTION OF QUESTIONS PRESENTED

The QUESTIONS PRESENTED stated by the defendants/appellants Connolly and Bellotti in their Motion to Dismiss or Affirm (or, in the Alternative, Brief in Opposition to Cert) are misleading and, as it is a deliberate obfuscation that has been the principal tactic of the respondents throughout this litigation, the obfuscation must be clarified. As stated by the defendants/appellants, the the questions might more properly be called: BEGGING THE QUESTIONS PRESENTED.

Assuming the Question at Issue

Nothing is more obvious than that this litigation centers around the constitutionality of the notion that a

party, as a private group, can make a rule and then, under the right of "Freedom of Association," add that private rule to the statutes of a state as written and duly enacted by a legislature. Nonetheless, the defendants/appellees persist in assuming the resolution of this radical departure in American constitutional jurisprudence in the framing of their case, as if the vaunted "clout" of the Massachusetts democratic political machine could somehow prevent this obvious attempt to assume the most controversial of their contentions from being examined.

Thus we see Connolly and Bellotti, in their Question Presented number 1 in this Motion, asking rhetorically whether, in

light of this Court's rejection of an appeal/or denial of cert in an earlier case which they staged, Bellotti v Connolly, 460 US 1057 (1983), a substantial federal question now exists concerning the validity of the Massachusetts statutory scheme for obtaining access to the primary ballot under the First and Fourteenth Amendments to the United States Constitution.

Leaving aside for the moment the unsupportable, artificial, separation-out of the questions presented by Art I,Sec.4, Cl.1 which, as we have pointed out, must be considered together with the First and Fourteenth Amendments in the case of a U.S. senate race in order for the

questions raised by those amendments to be properly considered, this framing of the question assumes the very radical notion which the defendants/appellees must prove in order for the lower court to be upheld: that the party inner group has a First Amendment right to go around adding its private rules to the state statutes as enacted by the duly elected legislature.

Of course no substantial federal question exists now, nor ever has, concerning the validity of the Massachusetts statutory scheme for primary ballot access, as written and enacted by the people's elected representatives of the legislature of Massachusetts. Plaintiffs/appellants have never made any claim that

the state statutory scheme for ballot access is invalid and in fact plaintiffs/appellants have clearly argued that this Court and any other federal court are required not only to recognize the state statutory scheme as presumptively valid, but to regard it, under 28 U.S.C. 1652, as a rule of decision.

What plaintiffs/appellants attack is the notion that the defendants/appellees can go around having an inner group of party members incorporating private rules into this state statutory scheme.

The antipathy of the Founding Fathers of this country toward political parties is well known. They were bound and determined not to give political parties

the power over voters and candidates that parties enjoyed in 18th Century England. This power in parties, in the eyes of the Founding Fathers, was the sure road to a ruinous rule of "faction," as they termed it. What we have here is a transparent attempt to insert political parties into the Constitution in defiance of the clear intent of that document and its authors. As such the attempt should be firmly rejected. Let not history record that this Court went along with the fond hopes of the defendants/appellees that such transparent begging of the real questions in this case could succeed.

Likewise the second question asks whether the state statutory scheme

violates Art I,Sec.4,Cl.1. Of course it doesn't. We never said it did. What we attack is the notion that a private party can add its rules to that state statutory scheme by virtue of the First Amendment.

CLARIFICATION OF CONNOLLY AND BELLOTTI'S STATEMENT OF THE CASE

A related obfuscation is attempted in Connolly and Bellotti's opening sentence of their STATEMENT OF THE CASE, which reads:

> This action challenges both a party rule and the Massachusetts statutory scheme which incoporates it and which limits access of candidates for statewide office to the Democratic primary ballot.

This is incorrect. We do not challenge the party rule. Party rules are fine as far as we're concerned, so long as you

don't claim you can engraft them upon the laws in defiance of the legislature. Likewise, it's the alleged "incorporation" of the private rule into the state statutory scheme that we attack, not the state statutory scheme. It is quite startling that Connolly and Bellotti think that this kind of "business as usual" which works in Boston will work in this Court. We respectfully submit that it is an insult to the intelligence and integrity of the Court. It should be firmly repudiated.

The Langone Obfuscation

Another obfuscation favored by Connolly and Bellotti is illustrated in

the last sentence of their Statement of the Case:

> The appellees now seek plenary review of the very issues which were before this court just two years ago.

This Court, of course, will be the judge of the accuracy of this assertion regardless of the insinuations of Connolly and Bellotti. However, it should be noted that there is simply no way that this assertion could be correct. This Court's dismissal of Bellotti's and Langone's appeal for want of jurisdiction, and its denial of cert cannot be dispositive here for the very simple reason that the prescription of state legislatures regulating senatorial races is an exercise

of delegated federal authority under Art I, Sec.4,Cl.1, unlike the same law as it regulates state lt.-gubernatorial races.

Despite the attempts of Connolly and Bellotti to artifically separate them out, this affects the First and Fourteenth Amendment issues. The Art I,Sec.4,Cl.1 issue cannot be isolated in a vacuum from the First and Fourteenth Amendment issues. Whether there are violations of these amendments must be viewed in light of the requirements of Art I,Sec.4,Cl.1 and the cases under it.

If the state legislature has not prescribed the 15 percent rule in the manner that it must under this clause, then any inequality introduced by the

rule, which, in instances like the present one, virtually disenfranchises 94+ percent of the party's rank-and-file, is per se violative of the Fourteenth Amendment. Similarly, it would violate the freedom to associate of all the party members, not just an inner group, since the inner group was not given the claimed special function in accord with the specific Art I provision.

THE ATTEMPT TO HIDE THE CLAIMED FEDERAL RIGHT BEHIND A STATE COURT "INTERPRETATION"

The other principal obfuscation relied upon by the other side in this litigation has again shown up in the Connolly motion. This is the notion that once a state court can be pursuaded (It

seems to have been rather easy in this instance.) to rather drastically alter the plain meaning of the exclusive provisions of the state statutory scheme as written in order to accomodate a claimed federal constitutional right, then somehow this dramatic "accomodation" becomes an interpretation, by the state's highest court, of a state statute on independent grounds which can then no longer, by virtue of some magical transmogrification, be examined by federal courts.

The simple fact is, as stated by Mr. Justice Stevens of this Court, joined by Mr. Justice Rehnquist and Madame Justice O'Connor, Bellotti v Connolly, 460 US 1057, that:

> The Massachusetts Supreme Judicial Court construed Chapter 53 to recognize the Democratic party's 15% rule because it believed that such a construction was required by the United States Constitution..."

If the construction is not required by the United States Constitution, then the unambiguous language of the state statutory scheme as written is binding upon this Court and every other federal court. Whether the federal constitution requires such a construction or not is hardly a question that is solely one of state law.

The Connolly motion deliberately distorts this sequence of events. (p. 8) Rather than telling us correctly that the state court bent the state law to

accomodate the alleged federal right, Connolly and Bellotti pull the old switcheroo. We are told that the state court "did not stop with an exposition of state law." No, "it went on to consider the constitutionality of the 15% Rule in a context identical to that presented by this appeal." With this little bit of sophistry this Court is expected to accept the magical transmogrification and believe that a case in which a state statute is bent to "accomodate" a claimed First Amendment right is equivalent to case in which a state statute is interpreted by its highest court free of any claims of conflicting federal rights and then it is determined whether the state statute as so

interpreted by the state's highest court is then in violation of a federal right. The two things are not the same.

DELEGATION AGAINST THE WISHES OF THE DELEGATOR: A NEW PRINCIPLE OF AGENCY

On page 15, after telling us there is no federal question involved, Connolly and Bellotti then cite a number of federal cases involving federal questions for the proposition that they are right that there is no federal question. After this little feat of prestidigitation, they then point out that several cases in the lower federal courts prove, because, they say, there is no conflict between them, that the "involvement of political parties in augmenting the statutory requirements for

ballot access or in playing a direct role in the selection of party nominees." is okay.

They don't, however, bother to inform the Court that there is not one of these cases in which a political party asserts a right under the First Amendment to delegate authority to itself to "augment" the statutory requirements for ballot access in defiance of a legislature's clearly expressed intent that such a delegation not be made, such as is now claimed by the defendants/appellees.

One need only ask the question, "Where is this delegation to be found?" to see how unsupportable the notion is. The legislature can scarce have made it

clearer that there was no such delegation. It revoked the authority for pre-primary conventions altogether, refused to enact 7 bills to revive and expand that authority and then passed a bill specifically repudiating the authority when it was claimed as a matter of federal inherent right. This delegation, then, is unique in the annals of jurisprudence. It is compelled by the delegee party as a matter of inherent federal right under the First Amendment, compelled from the legislature which holds the authority, against its wishes. The legislature can't control the delegation of this authority which is its own. Surely our basic law on agency ought to be rewritten to accomodate this

wondrous new right, along with our prior inadequate concepts of the First Amendment, which was thought heretofore to be a protective shield, not a hook to reach out and rip power away with.

Regardless of what Connolly and Bellotti may think plaintiffs/appellants argued (We think there's misunderstanding on this score.) there is no delegation of power here. Though the lower court has based its opinion on the supposition of the existence of such a delegation, it's not able to point to any delegation. This is with good reason; no delegation exists, whether we argued it or not.

SMILEY V HOLM

We are happy to see that parties on

the other side have taken cognizance of the existence of the unanimous opinion of this Court in Smiley v Holm, 285 US 355, (1932). However, since the opinion of Mr. Chief Justice Hughes in that case was that what was meant by the Times, Places and Manner Clause was what was recognized by the Founding Fathers at the time of the drafting of the Constitution as the normal process of legislative lawmaking, with all its accoutrements, we are somewhat puzzled by the conclusion then drawn, namely, that it is part of the method prescribed by Massachusetts for legislative enactments that the state laws as written and passed by the legislature shall then be bent to

"accomodate" First Amendment claims of Freedom of Association. We submit that it cannot have been part of what the Founding Fathers intended that the bending of state laws to accomodate claimed federal rights was part of the prescription of the legislatures.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served by United States Mail, first class, postage prepaid, this 22d day of April, 1985, true and accurate copies of the foregoing Brief in Opposition to Motion to Dismiss or Affirm of Connolly and Bellotti, upon Thomas R. Kiley, Assistant Attorney General, One Ashburton Place, Room 2001, Boston, Mass. 02108, counsel of record for defendants/appellees Connolly and Bellotti, 3 copies for each defendant, and on Keith Long, Esquire, Herrick and Smith, 100 Federal Street, Boston, Mass. 02110, counsel of record for defendants/appellees Atkins and the Democratic State Committee, 3 copies for each defendant.

Laurence A. Elgin

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(1)

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MICHAEL JOSEPH CONNOLLY, FRANCIS X. BELLOTTI, CHESTER G. ATKINS and THE DEMOCRATIC COMMITTEE OF MASSACHUSETTS,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

PLAINTIFFS/APPELLANTS' SUPPLEMENTAL BRIEF OPPOSING THE MOTION TO DISMISS OR AFFIRM OF APPELLEES CHESTER G. ATKINS AND THE DEMOCRATIC STATE COMMITTEE

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STATEMENT OF THE ASSUMPTION ADVANCED BY DEFENDANTS/APPELLEES CHESTER G. ATKINS AND THE DEMOCRATIC STATE COMMITTEE

The Constitution is conspicuously silent regarding political parties. The antipathy of the Founding Fathers toward them is too well known to require elaboration. The study of the parties of 18th century England in operation, with their power to control candidate selection absolutely, led to the omission of them from the Constitution and the installation of the "Times, Places and Manner Clause," Art I, Sec.4,Cl.1, and the "Qualifications Clauses," (That for the senate's Art.I, Sec.4,Cl.) to guard against their rise to power over candidates and to guard against the excesses of "faction."

The attempt of the defendants to radically depart from the intended treatment of political parties in the Constitution and find in the First Amendment-derived right of Freedom of Association an inherent private lawmaking power in parties by which an inner group of a party may promulgate a rule and either A) as defendants contended below, "incorporate" that rule into laws actually passed by a legislature against that legislature's will, or B) as the court below found on its own accord, compel, against the will of the legislature as the holder of the authority, "delegation" of the legislature's authority to make election laws governing ballot access to

the party inner group, constitutes an effort to overthrow the will of the Founding Fathers and insert parties into the Constitution. As such it relies, in this motion, and has throughout, upon obfuscation, deliberate confusion, and other tactics of disinformation. First among these is the tactic of assuming in the premises that which is really the conclusion.

Thus we see Atkins stating in his Statement of Facts that which is not fact at all, but is rather the radical contention that must be upheld by this Court if he and the Committee are to get away with their scheme to convert the American constitutional system into the

kind of system favored in Europe which the Founding Fathers rejected.

Thus we are told, as a fact, (p.13) that "Candidates...must satisfy several statutory requirements." The motion then lists "statutory requirements," among which is the requirement that the candidate "comply with all party rules governing primary ballot access that neither defeat the purpose of a primary election nor violate the constitutional rights of candidates or voters. Langone, supra, 388 Mass. at 194, 446 N.E.2d at 48." Now, I hope all the clerks who work on this case for the justices realize just how clever and smart this is. You see, you are not supposed to realize that

actually this is not a fact at all but a conclusion regarding perhaps the most central question in the case. Perhaps you can think of other "statutes" that are not statutes at all but rather rules that neither defeat the purpose of a primary election nor violate the constitutional rights of candidates or voters.

Admittedly, there is as of yet no codification of such supplements to the laws (the laws as the legislatures actually write them,) but that shouldn't stop anybody from exercising their First Amendment right to add to the laws. So the appellees urge you to just accept such additions as facts, on their say so. Think it over won't you.

The appellees did neglect to mention, (p.16), that in "following the model so successfully used (and upheld) in Connecticut," one little detail was left out: in Connecticut the legislature did prescribe the 20 Percent Rule in duly enacted statutes. We think this little omission tells more about the reliability of the representations in the motion than the statement tells about the "success" of the 20 percent rule in Connecticut. We point out that from p. 17 on the "Statement of Facts," contains some facts but is largely argumentation.

THE RES JUDICATA CONTENTION

One of the principal contentions in the motion is that, the First Amendment

claim having been instituted, and the party rule having been "added to" the statutes as written, the entire matter is now disposed of by this Court's rejection of the appeal or cert petition in Langone v Secretary of the Commonwealth, 388 Mass. 185, 446 N.E. 2d, which was in this Court as Bellotti v Connolly, 460 U.S. 1057 (1983), since somewhere along the way the First Amendment claim got magically transmuted into an independent interpretation by a state's highest court of one of its statutes, with no federal questions involved.

In our opposition brief to which this is a supplement we dealt with the question of why a U.S. senate race is not the same

as a state lt.-gubernatorial race and how, under the specific provisions of the Constitution governing senatorial races, all matters must be considered.

Now we address the other aspect of this argument of Defendants/appellees, the Hicks v Miranda argument, 422 US 332, 343--44: Citing Hicks, Atkins contends that this Court's refusal to hear the appeal or cert of Langone and Bellotti was a decision on the merits. We call the Court's attention to its later decision in Mandel v Bradley, 432 US 173 (1977) (Per Curiam.) That decision appears to have established that there is ambiguity inherent in summary dispositions and to

have established also the nature of the analysis that is essential before a decision can be made as to whether it is appropriate to accord a particular summary disposition precedential effect.

First, the constitutional questions presented must be the same. We have already seen that they are not. In this case there are questions raised by the Times, Places, and Manner and Qualifications Clauses, and the XVIIth Amendment which were simply not present in the earlier case.

Second, if the constitutional questions are precisely the same, as here they are not, then the judgment in fact must have rested upon decisions of those

points and not even arguably upon some alternative nonconstitutional ground. And it makes no difference that the unusually strong 3-justice dissent dissented from the idea that no appeal lay. That still leaves it ambiguous as to whether the rejection was essentially a denial of cert or not. This means that there is no precedential effect. Maryland v Baltimore Radio Show, 338 US 912, 919 (1950); Hughes Tool Co. v TWA, Inc., 409 US 363, 365-66 n. 1 (1973).

THE DELEGATION GAMBIT

Contrary to the several assertions of the appellees, we make no claim that state lawmaking processes may not constitution-

ally include party rules and procedures. (Motion, p 25) What we assert is that party rulemaking processes may not constitutionally include state lawmaking processes against the will of the legislatures in a manner, such as is claimed, that would enable the party to force the rules into the laws. So the appellees' citations of Clark v Rose, 379 F. Supp. 73 (SDNY 1974), and other such cases are beside the point. There is not a case cited that supports the contention that a political party may compel the state lawmaking process to include political party rules and procedures where the legislature, as it has in this case, has revoked the authority in question,

refused to re-enact it on several occasions, and has repudiated the rule claimed to include the state laws.

Essentially, appellees are arguing that because they say we have attacked the notion of authority's being delegated by a legislature they have a delegation of authority which we are attacking. All the cases they cite have in them a delegation of authority by a legislature, or else they involve situations where the statutes are silent. What appellees fail to show, however, is that the Massachusetts legislature ever delegated the authority which they claim. The record is clear that it did not.

PRE-EMPTION ENTITLES TO AN APPEAL

Either an authority is delegated from A to B or it is not delegated from A to B. Either it is delegated or it is revoked. It cannot be simultaneously both revoked and delegated. Yet this logical impossibility is what Atkins claims in trying to deny our right of appeal. The lower court has found a delegation, which the other side now argues. The delegation pre-empts the revocation in the 1973 statute and restores pre-primary conventions. It is that simple.

THERE IS NO RIGHT OF PARTIES TO ESTABLISH CANDIDATE SELECTION PROCEDURES IN RACES FOR THE NATIONAL CONGRESS.

We previously cited the positive authority for this proposition. The

authority cited in the Motion by Atkins to support the opposite point of view are inapposite and readily distinguished. (p.32). All of this authorit y involves situations where no constitutional mandate applies (Puerto Rico, national party presidential conventions.) or where a constitutional system is no longer applicable (discretionary electoral college.)

SMILEY V HOLM

It is certainly nice to see so much discussion of Smiley v Holm, 285 US 355 (1932), which, until now, appellees have avoided like the plague despite the repeated citation of it by plaintiffs.

However, we feel constrained to point out that the conclusions drawn from the case in both motions are a bit odd. They essentially are ignoring the fact that the legislature has repudiated the authority for a pre-primary convention and rules to go with it in every way that a legislature can. Their argument is that a private lawmaking authority such as is claimed here, though claimed pursuant to the First Amendment, is, nonetheless, authority that is prescribed by the Massachusetts legislature in the manner specified by the laws of Massachusetts. This is so, they say, because of the decision of the Supreme Judicial Court interpreting the state statutes as not having their plain

meaning in order to accomodate the claimed First Amendment right. This decision, it is argued, upholding, as it does, the claimed federal right of the party to add to the laws as written, is, nonetheless, part of the "entire lawmaking process as construed by that state." In other words, the legislature, the body to which the Founding Fathers delegated the Times, Places and Manner authority in the first place, subject to the authority of Congress to override, can be totally bypassed because of the alleged freedom of association right and state court's interpreting federal First Amendment claims put in its stead. We respectfully submit that this is utter nonsense, and

comes close to the 'big lie" techniques of totalitarian propaganda. IF there is one thing that Smiley does not stand for, it is the defiance and bypassing of state legislatures. Not only would this pervert the meaning of the clause in the first instance, it would also mean that, since Congress has an override authority under Art.I,Sec.4,Cl.1, the party, with its inherent right of Freedom of Association, could add to the laws of Congress and, if a friendly state court could again be lined up, could have that authority be part of the procedures prescribed by Massachusetts for making its laws.

There is absolutely nothing

prescribed by the State of Massachusetts as part of its regular way of making laws that provides for private lawmaking against the wishes of the legislature.

THE XVIITH AMEND MENT

Because the case was dismissed before discovery could be had and argumentation developed and refined, the XVIIth Amendment arguments were not developed in depth until the briefing in the court of appeals. Nonetheless, we are entitled to argue this amendment and have it considered as a standard and substantively.

CLEMENTS V FASHING

This case is cited to support the assertion that a candidate has no

fundamental right to run in a party primary. However, that is irrelevant here. For a U.S. senator candidate, once the legislature of his or her state has prescribed pursuant to Art.I,Sec.4,Cl.1, has a right to run under that prescription, unless the legislature has actually delegated, under the same properly done laws, part of its authority to a party. But certainly the legislature has done nothing of the kind in this instance.

WRITE-INS

A write-in possibility does not make up for improper ballot access burdens. Lubin v Panish, 415 US 709; McCarthy v Briscoe, 429 US 1317; Bullock v Carter,

405 US 134; Communist Party of Indiana v Whitcomb, 414 US 441; U.S. v Classic, 313 U.S. 299.

Care must be taken not to confuse the interests of partisan organizations with governmental interests. Elrod v Burns, 427 US 347, 362. A primary is a state function of a party. Marchiori v Chaney, 442 US 191.

Respectfully Submitted.

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CERTIFICATE OF SERVICE

I hereby certify that I have served by United States mail, first class, postage prepaid, this 23rd day of April, 1985, true and accurate copies of the foregoing brief in opposition to the motion to dismiss or affirm of defendants Atkins and the Democratic State Committee upon Thomas R. Kiley, Ass't Att'y General, One Ashburton Place, Room 2001, Boston, Mass., 02108, counsel of record for defendants Connolly and Bellotti, 3 copies for each defendant, and on Keith Long, Esq., Herrick and Smith, 100 Federal Street, Boston, MA, counsel of record for defendants Atkins and the Democratic State Committee, 3 copies for each defendant.

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NO. 84-1440

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

ALWIN E. HOPFMANN, GREGORY HESSION, CLARENCE PERKINS, CLARENCE PAULIN, and BETH SULLIVAN,

Appellants,

v.

MICHAEL JOSEPH CONNOLLY, FRANCIS X. BELLOTTI, CHESTER G. ATKINS and THE DEMOCRATIC STATE COMMITTEE OF MASSACHUSETTS,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Appendix, Vol.3, Supplementary

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"UNREFORMING THE PARTIES" BY J. PATRICK DOBEL and RONALD R. STOCKTON

Published in COMMONSENSE, Summer, 1979

Something is clearly wrong with our political system. The symptoms of malfunction are obvious; individual participation has dropped precipitously; factionalism has increased and wields greater impact; political debate has shifted from substantive issues to issues of symbolism or of ad hoc self-interest; individuals move from oblivion to the centers of power with astonishing and disturbing ease; fewer citizens than ever before identify with political parties; faith in public institutions declines in a rapid spiral.

While many factors contribute to these tendencies, a fundamental political problem is that political parties are not performing their functions. Without working parties, social cohesion and the ties of one individual to another break down as do the linkages of individuals to political structures. The political effectiveness of the system, particularly its ability to mediate conflict and arrive at a workable consensus, is also considerably impaired.

We believe much of the decline of the party as an effective institution can be traced to certain changes and "reforms" made in recent years. After discussing the functions of the parties and the consequences of their disruption, we will propose several not-too-modest "unreforms" to revivify the parties.

Functions of Parties

It is intriguing that in many countries where there is no organized opposition and no system of free elections, the government nevertheless finds it desirable to maintain political parties and to hold periodic elections. In American society, we think of elections as primarily serving to select between policy alternatives but, in fact, selection of policy alternatives is only one of several functions performed by an election campaign. On a long range basis, the others are more important.

First, elections and parties develop linkages between the individual and the political system. During the course of a campaign, voters become familiar with the structures of government, the issues, the individuals who head the structures, and the fact that these leaders are, at least

on a limited basis, subject to public scrutiny and influence. Leaders in turn are forced to stand before the public as servants. Practical political knowledge increases; efficacy, both personal and political, spreads beyond the elite classes to the ranks of the poor and the economically disenfranchised to make political accountability possible. Conflict is channeled into manageable forms rather than violence.

Second, elections and parties generate social cohesion which links individual to individual and group to group. During a campaign, people who might ordinarily not mix are brought together in common activities and goals. The atomization and isolation inherent in all modern societies are overcome or inhibited.

Third, parties and elections forge policy consensus. Different groups are

obligated out of necessity to cooperate and compromise. Group leaders and individuals must confront different ideas and try to understand alternative points of view. If it does nothing else, a campaign forces people and groups who ordinarily hate each other to bite their tongues and pose together with smiles for public photographs.

Fourth, parties and elections force individuals to see their problems and interests in a society-wide framework. While appeals are always made to particularist concerns, leaders try to link together the concerns of diverse groups and show the common thread of community, however imperfectly defined. Thus a key by-product of campaigns is the creation of ideology, which reinforces social cohesion, creates a workable policy consensus,

and builds individual trust in the political system.

Last, and perhaps most importantly, participation in the parties is one of the few ways the poor and workers have gained any control over their destinies and been brought into the system. For in politics, intensity of commitment and numbers of people combined with party organization can be more important than wealth. With these tools, the poor, workers, and minorities have been able to use parties to augment their influence. In many countries, the normal pattern of higher participation by the affluent and educated is offset by workers' participation in parties at a far higher rate than one would expect. It is not by chance that many of the great ethnic groups in America first gained power and recognition in the arena of politics where "machines," votes,

and loyalty mattered more than wealth and education. The parties have been one of the country's most important devices for encouraging upward social mobility, bringing hidden grievances onto the political agenda, and avoiding the dangers of protracted class war.

The Weakening of Parties and the Transfer of Political Power

It is commonly acknowledged that the predominance of the electronic media in campaigns has injured the parties severely, but a confluence of other political reforms also have struck at party roots. The constant move toward merit and civil service appointments at all levels of government eliminates the few remaining sources of political patronage. The extension of primaries eliminates the screening and socializing functions of the party and makes conventions irrelevant to nomination, in spite of the fact that it

is in conventions where a workable consensus can be forged and candidate responsibility ensured. Restrictions in the Hatch Act dovetail with the limitation upon patronage to deprive parties and the political system of the participation of one of the most politically active parts of the population. The distribution of federal and state election funds, while generally desirable, shifts the focus from parties and grassroots politics to independent entrepreneurial candidates. Convention rules which devalue prior party participation encourage the intervention of non-committed groups to capture the proceedings for limited ideological reasons and further reduce incentives for active participation in parties.

The most obvious consequence of the decline of parties has been the radical decline in political participation. At

the present time the majority of people under 30 have no reliable party identification. During the last decade, an estimated 15 million American citizens, many of them formerly regular voters, stopped voting. Turnout in presidential elections has dropped, by one estimate from 64 percent in 1960 to 54 percent in 1976. As substantive political participation has declined, alienation, distrust, and withdrawal, especially in the disenfranchised groups, has significantly increased.

It is all too easy to blame this significant decline upon "citizen apathy," but we contend that the people have not failed politics but that politics has failed the people. Citizens do not participate because there is little reason to particiapte, and because their participation is not wanted. The new system emphasizes the efficiency of

election mobilization. It ignores individual participation as inefficient, and depersonalizes citizens into a mass, manipulatable by the media. Simply put, this means the elimination of parties as they have historically functioned. It means parties without politics and politics without parties.

Without parties, public campaigns do not address the real concerns of lift. They provide spectacle and drama but do not encourage people to work for candidates or to think about public issues, nor do they extend a sense of personal worth or efficacy to the citizenry. On the other hand, without politics, parties are reduced to irrelevant bureaucracies or labels which can be captured by personal factions and used for their own ends.

The separation of politics from parties has consequently resulted in a

transfer of power from the working classes to elites. The party once needed and utilized the resources of the working classes - intensity of commitment, local concern, and people-power. Canvassing, organizing grassroots campaigns, and getting out the vote all required large numbers of organized people tied into a party structure. The party's strength in people-power gave it a base of operation and gave the people a base in the party. These are no longer needed. The weakening of the parties has been a windfall for a new brand of technocrat political mercenaries and the politicians who can afford them. A plethora of survey research, marketing, advertising and direct mail firms has created a growth industry around aspiring politicians. Increasingly candidates with enough money, regardless of

previous experience or commitment, can-capture a primary and an election by the use of money and merchandising skill. the "outsider" or "independent" becomes the norm in American politics - a situation encouraged by the reliance upon primaries where the media most effectively mobilizes people. The emphasis upon ad hoc mobilization for limited electoral purposes reduces the non-elites to electoral pawns in the game of media mobilization and effectively closes them out from sustained influence via their importance in organized parties. In response, the poor, workers, and lower middle classes reduce their participation. The dominant new electorate is then fairly small, well-educated, and "sophisticated." Basically, it shares in the advantages of a prosperous, special-interest-oriented status quo.

The nature of a new political style also calls into being a new type of politician who is either independently wealthy or almost singularly dependent upon those who are. To gain access to media one must have money. To the outside candidate, running without the backing of party structures, this means a personal fortune, access to a personal fortune (perhaps that of some ideological sugar daddy), funding from some large interest or ideological group, or a computerized direct mailing to selected lists of people scientifically chosen because of their tested propensity to contribute to issues or candidates of their liking.

The above approaches all by-pass parties, continuous political organizations, and people-power in favor of direct money. But a non-party candidate can move

from a money/media strategy to a caricature of the people-power strategy, by a reliance on a "kiddie corps" approach. The essence of this strategy, as perfected by Eugene McCarthy and George McGovern, is to lead an inspired cadre of activists - whom James Q. Wilson calls "purists" - committed to a number of clear and important policy differences at variance with the status quo. The strategy relies, in spite of disclaimers by such candidates, on a cult of personality. Issues alone do not inspire tireless armies of volunteers. The campaign depends upon a single-issue or some limited ideological positions and an image of the candidate as an anti-politician (read: non-compromiser; read: ineffective politician). While this strategy seems people-oriented it is not, for it relies on an ad hoc mobilization, not continuous organization; furthermore,

the amateurs likely to dominate such a campaign are usually young, upper middle class, well-educated, and ideologically committed. They are notorious for their inability to mobilize the working classes or even deal effectively with regular activists. Their commitment is often unstable and easily withdrawn when the candidate tries to play a political role with groups whose viewpoint is different from that of his activists supporters. As George McGovern discovered, when he tried to make peace with party regulars, the accusation that one is "just a politician" can have a devastating impact on such an ad hoc organization.

Furthermore, partyless politics handle political conflicts in a particularly dangerous and ineffective manner. The new activists demand a clear and rigid commitment on the part of the candidate,

whether it be to the special interest of an economic or idealogical group or to the specific demands of the kiddie corps, the mass mailin clientele or the sugar daddy. A candidate's flexibility, bargaining power, and autonomy are decreased; political consensus becomes extremely difficult to obtain when politicians cannot negotiate and interest groups are content to settle for vetoes rather than positive agreements. The traditional party provided mobilized support under an umbrella of common issues and structural identify and give the political leader negotiating autonomy. No such shelter exists today.

Without an on-going organization to turn out large numbers of voters, the candidate may be forced to rely on narrowly targeted media appeals to temporarily mobilize a limited body of otherwise lethargic people. This mobilization must

be based inevitably upon candidate personality and ad hoc issues. The link between the politician and the public thus shifts from the party to the coterie, a small, closed group of dedicated people whose prime loyalty is to one person.

The coterie is fundamentally different from the party is replaces. To start with, the members of the coterie derive their influence from their relationship to the candidate and from their personal loyalty. The party leaders, in contrast, have an independent power base and are more loyal to the organization or issues than to the candidate. Secondly, the coterie only serves the candidate: it raises money, handles the media, services interest groups and runs the technologies of campaigning. Unlike the party, it need give little consideration to the public

good, party discipline, or effective political compromise.

Although coteries have always been in politics, they have not been the primary form of organization. In the past, they were forced to come to terms with the party and its agenda. Their loyalty to the candidate was moderated by the practical need for party support. Today such restraints are minimal. Consequently, the closed nature of coteries in a non-party world makes them far more vulnerable to decision making distorted by in-group loyalty: Carter, Kennedy and Nixon have all suffered from this problem and the dangers inherent in it.

This new form of campaign organization frustrates the purpose of politics. The new breed of candidate can win an election, but cannot cultivate

long range compliance or support from the electorate. Given their limits, legislatures seldom address important issues, and when they act, the results are rife with interest group exceptions. No public consensus develops because there is little discussion of issues in the campaign. The party for its part is incapable of gaining a disciplined consensus among its members. The hard political choices are left to discretionary bureaucracies or to the courts.

The emergence of partyless politics has led to great declines in traditional participation and to the emergence of two alternative patterns of neo-participation. In the first pattern, rigid single-interest groups coalesce committed individuals around burning issues for periods of time. These groups have no concern with parties

or candidates but only with issue positions. These specific interest groups can raid the parties and capture them for their own ends much like candidates can capture party labels for their own purposes. They have little use for compromise or consensus and frustrate the party's ability to generate either.

In the second pattern, citizens frustrated by inaction turn to the ballot box for a means of accountability presently denied them. The marked preference for plebiscitary initiatives all over the country stems from the impotence of the parties and their failure to mediate between the people and government or to develop any consensus on issues. The plebiscites also reflect he new pattern of financing in politics. Most referenda rely on kiddie corps on a well-financed,

often hidden support and exclusive media manipulation.

Unreforming the Parties

Our proposals are designed to shift the patterns of citizen participation to more substantive modes and ensure that this participation occurs largely within party structures. We would accomplish this by redeploying incentives to provide more satisfaction, influence, and concrete economic reward for actual party participation. We want more people working, wearing buttons, putting posters in their yards, talking, thinking, and committing themselves. The trends toward coterie organization, media demogogues, irresponsible politics, lack of legislative discipline, and increasing elite dominance of the political system can only be fought with more participation and stronger parties.

The proposals encompass three areas: primaries and conventions, the civil service merit system, and the expenditure patterns of candidates. Although the proposals center on the federal level, their analogues apply at the state and local levels.

First, all party decisions relating to policy and candidates should be made by conventions at which no more than one-half of all delegates are chosen by primaries. This rule would apply at both federal and state levels and would mean that delegates to the national nominating conventions would be chosen by state conventions rather than by direct vote of the public. We feel strongly that primaries should be used to send a message to the conventions and not to make decisions. This proposal recognizes the role of primaries as a

check on bossism yet avoids the dangers inherent in an unlimited primary.

Second, a modified spoils system should be introduced. All policy-making positions should continue serving at the behest of the administration in power. In non-policy civil service grades, however, 5-10 percent of all new federal appointments which open as a consequence of retirement or new funding should be filled on the basis of demonstrated civil service competence and the political recommendations of the party. These positions would be allocated to state party commissions on the basis of the parties' performances in the last presidential election. Seventy percent of the positions would go to the party which carried the state and 30 percent would go to the losing party. Additionally the Hatch Act should be

repealed or modified to allow government employees full participatory rights.*

*(Ed.Note) Lest the Democratic authorship of the article be in doubt, this proposal is one on which most Republicans, in the past, have disagreed with the authors, while not wholly dissenting from the notion that a patronage system does have its virtues. As this issue went to press, the entire subject was somewhat clouded by a ruling from the U.S. District Court in Chicago, that political patronage represents an unconstitutional deprivation of equal protection and due process of the law. Shakman, et al. v. Democratic Organization of Cook County, Civil No. 69C2145 (1979)

Third, the pattern of television candidacies should be changed. Television has an enormous capacity to inform, but likewise, it has an enormous capacity to manipulate. Reliance on media advertising tends to distort a campaign by shifting the focus from grassroots organization and coalition building to fundraising and mass manipulation. We have two proposals: free air time and standardized format.

Recalling that the public owns the airways and that networks use them free of charge, television stations should be required to provide a fixed amount of free and prime air time to bona fide parties and candidates. A bona find party would be one which met a minimum vote total in the previous election (perhaps 10 percent); a bona fide candidate (in a primary) would be one who can present qualifying petitions signed by an agreed upon percentage

of the electorate. The percentage figure should be low enough to be achievable but high enough to require an organizational effort rather than a simple coterie candidacy.

The rules for the use of this television time could be flexible but should follow certain principles: first, a candidate accepting free time should be discouraged from purchasing additional time. Second, certain prime times should be designated for the showing of political information programs and no other programming could be presented during these times on any stations. Third, use of short duration advertising - image blitz - the slick thirty-second "spot" -should be minimized. All candidate or party information programs should last a minimum of 10 minutes and must focus on a candidate or a

party leader presenting issue positions.

Critics will point out that these proposals discriminate against third parties. Indeed they do, but then so does the whole single-member plurality electoral system. If the nation shifted to a proportional representation electoral plan (a shift we would oppose), we would consider adjusting our proposals accordingly. Meanwhile, false concern for minor parties must not be allowed to destroy the only viable parties we have.

The most immediate impact of these proposals would be to strengthen the parties and give them an independent power base by drawing more people into their ranks. The shift of decisionmaking back to caucuses and conventions will give party membership and party activity more purpose and responsibility. Interested

individuals will gravitate to the power center (the party organization) and will gain far more influence and satisfaction in dealing with live candidates, real issues, and real people than is provided by a world of media candidates and primaries. The incentives will be strengthened by the fat that conventions will be serious business and participation in them will be tied to party participation and loyalty.

In addition,since government servants in other countries manifest more political efficacy, interest, and inclination to act in the political process than most of the population, our assumption is that the parties will benefit the most from their reentry into the political arena.

Most importantly, the concrete awards of patronage and direct influence will draw more disenfranchised groups into the

parties and the political process. "Frozen out of many opportunities like immigrants of the past, the present poor and minorities are denied patronage as a way of building machines and political gain. Civil service reform was tainted with a strong desire to undermine the influence which the poor and ethnics gained through patronage. The system needs more messy participation, especially from people who have neither the trust nor the political efficacy to lead them to naturally participate. Even with mixed motives, as in the case of patronage-inspired work, political participation increases people's sense of efficacy, personal esteem, and trust in the political order. It also unleashes new creative energies and changes the political agenda to a more human scale of neighborhoods and real-life needs.

Shifting the balance back to a caucus and reintroducing spoils takes account of the fact that real-life politics is a human activity. Political work requires time and energy. Most of us do not have or only occasionally have the fervor to spend long hours for an ideal or crusade. But we usually can care if there are possibilities of real human satisfactions from working with people, having responsibility, influencing and meeting candidates, and going to conventions. It might even mean a job for oneself or people we care about.

New decision power and the resources of new people and patronage will give the party its own bargaining chips to counteract the sources of economic or ideological political wealth. The self-interest of candidates will lead them back to work with the parties: first, the party will

be the focus of critical decisions for their own continued career; second, politicians will need the patronage and have to meet with the state party apparatus to gain access; third, the party can once again provide an independent haven to support its own political integrity against the specific and rigid demands of single-interest groups; fourth, with limits upon media expenditures, candidates will not be able to ride a media-coteria route to office and will need party resources; fifth, candidates will work with the party in election years since all state politicians gain from the success of the party through the patronage pool.

The reestablishment of a working relationship between politicians and their parties will make party loyalty an issue for the politician. The party's new

negotiating position would give it some small chance of reintroducing some responsibility and discipline into its own ranks. Confronting real people in smoke-filled rooms and conventions is far more efficacious for political accountability than making television commercials. Candidate training would be more complete: they would learn bargaining, communication, and compromise skills, and party structure would gradually generate new candidacies from its own ranks. Coteries would be less closed since candidates could no longer hide behind television screens; more hard bargaining would take place and coteries would be more open and co-optative.

Our proposals will not end the paralysis of American politics or create a new consensus, but they will help strengthen the one set of institutions

which can accomplish both. Unreforming the parties will draw more people, especially the disenfranchised and powerless, into substantive politics. This will give the parties a more substantial independent base from which to build consensus on issues, generate skilled politicians, and discipline recalcitrant demogogues. Only parties can get political discussion back on the street where it belongs and take it out of the hands of semi-mesmerized people watching thirty-second commercials as unrelated to real life as White Tornadoes in the kitchen or the Man from Glad.

FROM THE AGREED UPON LEGISLATIVE HISTORY

FROM THE COURT BELOW

"DEMOCRATIC COMMISSION DRAFTS PARTY CHARTER" BY JEROME MILEUR

Ed McColgan, a former state legislator and unsuccessful candidate for Congress in 1976, told the Massachusetts Democratic Charter Commission last fall that there is "almost no real Democratic Party organization in this state at the local level." In his bid for Congress, McColgan said, only 14 of the 88 Democratic town and city committees in the First District gave any financial help, and only about ten others even "took the time to meet and endorse me." "You court ward and town committees," he added, "because you

have to, but in almost all cases they're an insignificant factor."

McColgan's lament became a familiar refrain to the 25 members of the Charter Commission, which was created last September by then-state party chairman Charles Flaherty after being mandated by vote of the party's 1977 state issues convention. The Commission began its work in October by holding seven public hearings attended by several hundred Democrats across the Commonwealth. Several themes ran through the testimony it hears: the organizational decay of the party at its grass roots, the weakness of the state committee, and the absence of party discipline and accountability.

In November, when the Commission turned to the actual drafting of a charter, there was general agrteement among its members that significant changes would

have to be made in party structure if the desires of rank-and-file Democrats for a stronger party were to be realized. The Commission unveiled its work in late March, and the draft charter now being circulated to Democratic town, ward and city committees does indeed call for major changes in current party structure.

The proposed charter restores the state convention, which was abolished in 1972 by a Democrat-controlled state legislature. In fact, the charter calls for two kinds of state conventions -- an issues convention in odd-numbered years to adopt a party agenda, and an endorsing convention to pick candidtes for statewide (Constitutional and U.S. Senate) offices in even-numbered years when any are to be filled. Many local Democrats attributed the deterioration of town and ward commit-

tees to the elimination of state conventions; and former House Speaker, David Barrley, at a recent state party gathering in Northampton, called the vote to repeal the convention, taken during his tenure as Speaker, a "mistake."

The draft charter also changes the way in which conventions are organized and operate. Delegates are to be allocated to towns and cities on the basis of "one-Democrat, one-vote" formula, and are to be chosen at local party caucuses open to all enrolled Democrats and not just to members of local party committees. Resolutions for issues conventions are to be developed through processes beginning at local caucuses, and are to be adopted by majority vote of the convention. Convention endorsements are also to be made by majority vote, but any candidate receiving at least 20 percent of the vote on any ballot

for a particular office would be permitted to challenge the convention endorsement in the state primary.

Several major changes are proposed for the party's state committee, which was a target of frequent criticism from town and ward Democrats, Reflecting recommendations from local Democrats, the charter provides for the election of state committee members by direct vote of town and ward committee members, rather than at presidential primaries, and for shortening state committee terms from four to two years. The first links the state committee organizationally to local party committees, and the second affords the latter frequent opportunity to hold their state committee members accountable to local interests and concerns.

The proposed charter also spells out the duties and responsibilities of the

state committee. It gives the committee responsibility for conducting the party's state campaigns, filling vacancies in party nominations for statewide or congressional office, formulating and disseminating statements of party policy, and raising and disbursing monies needed to operate the party. It furthermore directs the state committee to set standards for local committee by-laws, to maintain regular communication and provide training and other services for local committees, and to monitor local committees and elected officials of the party to assure support for candidates and policies of the party.

The draft charter, in addition, enlarges the size of the state committee from its present 90 members to approximately 300, a change intended to broaden and diversify participation in party

affairs at the state level. The great majority of state committee members, 250 of the total, are to be elected by members of local party committees, with the remainder being ex-officio (Democratic constitutional officers, state legislative leaders, members of Congress and of the national committee) and affirmative action members. The charter also requires that the state committee meet at least six times a year, and that individual state committee members meet at least twice annually with town, ward and city committees within their districts.

The Commission has struggled with the question of what the district should be from which to elect state committee members. At present, they are chosen from state senate districts, and the Commission initially agreed to continue this practice. It subsequently reconsidered that

decision, flirted briefly with counties as the unit from which to elect state committee members, and settled finally on congressional districts. The problem has been to find a unit that is simultaneously fair to all elements in the party -- geographic and other -- and workable. It is a problem to which the Commission will no doubt return.

The proposed charter makes several changes in the election and organization of local party committees. Town and ward committee members will continue to be elected at presidential primaries for four-year terms, but slate voting is eliminated and instead candidates for local committee positions will file as individuals. Officers of local committees will be elected every two years, rather than every four as is now the case, and local committees will be required to meet

at least six times a year. these changes, like those in the state committee, reflect recommendations made repeatedly during the Commission's fall hearings.

Another recommendation advanced frequently by rank-and-file Democrats was that the Commission authorize local committees to remove so-called "dead wood" (inactive members) and to discipline those who supported candidates of another party. In this regard, the draft charter provides that state and local committee members may be removed through procedures guaranteeing due process and requiring majority vote of committee members for the following reasons: failure to attend half of the regularly scheduled committee meetings in a calendar year, public opposition to a

nominee of the party or public support for another party or candidate thereof, unauthorized use of the party name or resources, or conviction after appeals are exhausted of a criminal offense other than a misdemeanor.

The proposed charter does a number of other things as well. It establishes a five-member state judicial council responsible for compliance of state and local committees with the charter and for adjudicating disputes arising from it or between party committees at any level. It mandates a program of affirmative action and outreach designed to encourage full participation in party affairs at all levels by all segments of the population. Finally, it requires the state committee to adopt codes of ethical conduct and fair ampaign practices for all party members and candidates, requires party meetings at

all levels to be open to the public, and eliminates secret and proxy voting.

A Worcester Democrat told the Commission last fall, "People who are Democrats have the right to expect that they'll have something to say about what their party and its officials do." The proposed party charter is designed to give rank-and-file Democrats that right. The charter has now gone to Democratic town, ward and city committees for their reactions, after which the Commission will make revisions as seem appropriate. The Commission's final draft will be submitted for ratification to a state charter convention presently planned for next September. It will be an opportunity for Democrats in Massachusetts to move toward the strong and responsible party so many desire. It may be the last such opportunity for some time to come.

FROM THE AGREED UPON STATEMENT OF FACTS IN THE DISTRICT COURT

As Incorporated from the Agreed Upon Statement in Langone:

1970 Convention

28. The State Democratic Party held a pre-primary convention on June 12, 1970.

29. The delegates to the 1970 State Democratic convention were selected in accordance with G.L. c. 53 Secs. 54-54D, as then appearing, and the conduct of the convention and the qualifications of candidates to appear on the primary ballot were governed exclusively by the existing state statutory scheme.

1972 Convention

30. The State Democratic Party held a

pre-primary convention on June 10, 1972.

31. The delegates to the 1972 State Democratic convention were selected in accordance with G.L. c. Secs. 54-54D, as then appearing, and the conduct of the convention and the qualifications of candidates to appear on the primary ballot were governed exclusively by the existing state statutory scheme.

32. There were no pre-primary or endorsing conventions conducted by the State Democratic Party between 1972 and 1982.

1979 CHARTER CONVENTION

33. Pursuant to a vote of the Democratic State Committee, the Chairman, Charles F. Flaherty, in February, 1977,

appointed a Charter Commission to draft a proposed charter for the State Democratic Party.

34. The Charter Commission of the Massachusetts Democratic Party submitted a proposed charter which provided in pertinent part in Article Six, Section III, that:

ENDORSING CONVENTION

There shall be a State Convention in even-numbered years for the purpose of endorsing candidates for statewide offices in those years in which such office is to be filled. Endorsements for statewide office of enrolled Democrats nominated at the Convention shall be by majority vote of the delegates present and voting, with the provision that any nominee who recieves at least 20 percent of the Convention vote on any ballot for a particular office may challenge the convention endorsement in a State Primary Election.

34A The documents which are attached hereto as Attachments 7A through 7D are true copies of documents which are attached hereto as Attachments [legislative history documents included in this appendix] are true copies of documents which were available to the Charter Commission during its deliberations.

35. The delegates at the 1979 Charter convention were elected at caucuses on March 24, 1979, conducted in each ward and town in the Commonwealth. Approximately, 30,000 individuals participated in the caucuses.

36. Any and all registered democrats

could take part in the caucuses which elected the delegates to the 1979 Charter Convention. Registration was determined by official city or town records. There was no requirement establishing the length of time and individual had to have been enrolled in the Democratic Party prior to taking part in the caucuses which elected delegates to the 1979 Charter Convention.

37. A convention of the State Democratic Party was held on May 19, 1979 for the purpose of adopting a Charter for the State Democratic Party.

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39. On May 19, 1979, a notice was distributed to all delegates attending the 1979 Charter Convention. A true copy of

that notice is attached hereto and incorporated herein as Attachment No. 8.["Important Notice" legislative history document included in this appendix]

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42. Defendant Michael J. Connolly, as a Democrat holding the position of Secretary of the Commonwealth, was and is a member of the Democratic State Committee. As a member of the Democratic State committee, he attended the Charter Convention as a voting delegate...

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44. During the November 17, 1979 continuation of the Charter Convention an amendment was adopted to amend Article Six, Section III, by substituting "15%"

in place of "20%".

45. The question of whether legislation would be necessary to implement the 15% requirement imposed by Article Six, Section III of the Charter was discussed by the Convention delegates and was unresolved.

46. The provisions of Article Six, Section III, as they currently read, were adopted at the November continuance of the Charter Convention.

1982 CONVENTION

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58. If allowed, Chester G. Atkins, the Chairman of the Democratic State Committee would testify that he stated at said meeting his opinon that the case of

Democratic Party of U.S. v. Wisconsin, 450 U.S. 107 1981), could make Article Six, Section III and the "15 percent rule" contained therein effective without legislation.

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61. Delegates to the 1982 Endorsing convention were elected at caucuses conducted in each ward and town of the commonwealth on february 6, 1982. The primary notice of the 1982 Democratic caucuses given to registered Democrats was by newspaper announcements run at least once in every daily or weekly newspaper throuyhout the the Commonwealth. Notices were also sent to affirmative action organizatons throughout the Commonwealth.

62. Any and all registered democrats could take part in the February 6, 1982 caucuses. To take part in the February 6, 1982 caucuses an individual had toahve been enrolled in the Democratic Paty on or before December 31, 1981, as determined by official city or town records.

63. Approximately 100,000 individuals participated in the caucuses held on February 6, 1982.

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97. Since 1972, no Democrat who has obtained the nomination of the Democratic Party at a state primary for a statewide elective office, has lost in the general election.

Legislative History, Att.8, refered to in

39 above:

DEMOCRATIC STATE COMMITTEE Chet Atkins, Chairman, 14 Beacon Street*Suite 719*Boston*Massachusetts 02108*(617) 367 4760

IMPORTANT NOTICE

TO:CONVENTION DELEGATES
FROM: DEMOCRATIC STATE COMMITTEE

There is presently a case before the United States Supreme Court (Marchioro v. Chaney) which may directly affect the actions taken at today's convention.

In July of 1978, the Washington State Supreme Court ruled on a case involving a conflict between state law and party law. By a vote of 5-4, the court held that the provisions of state law prevailed over the

provisions of the state's Party Charter.

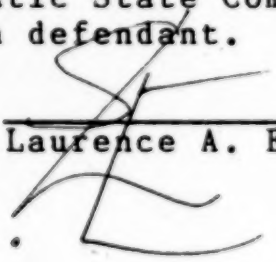
This decision has been appealed to the U.S. Supreme Court. The decenting[sic] opinion from the Washington State Supreme Court held that a Party's internal organization should be decided by the Party without regard to state law.

There is a distinct possibility that the decision of the Washington State Supreme Court will be reversed by the U.S. Supreme Court, and that a Party Charter will be held to supersede state law.

Please keep this in mind when voting on the Charter.

CERTIFICATE OF SERVICE

I hereby certify that true and accurate copies of the foregoing APPENDIX, VOL. 3, SUPPLEMENTAL, have been served, this 24th day of April, 1985, by United States mail, first class, postage prepaid, upon Thomas R. Kiley, Asst. Atty. General, One Ashburton Place, Room 2001, Boston, Mass., 02108, counsel of record for defendants/appellees Connolly and Bellotti, 3 copies for each defendant, and upon Keith Long, Esq., Herrick and Smith, 100 Federal Street, Boston, Mass. 02110, Counsel of record for defendants Atkins and the Democratic State Committee, 3 copies for each defendant.



Laurence A. Elgin

(9)

SUPREME COURT OF THE UNITED STATES

ALWIN E. HOPFMANN ET AL. *v.* MICHAEL JOSEPH CONNOLLY ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 84–1440. Decided May 13, 1985

PER CURIAM.

Appeal from the United States Court of Appeals for the First Circuit is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, the petition is granted.

Hopfmann filed this action in the Federal District Court for the District of Massachusetts challenging a provision in the Charter of the Massachusetts Democratic Party. Among the theories he advanced was a claim that the provision, as enforced by Mass. Gen. Laws Ann. ch. 53, §§ 1–121 (1975 & 1985 Supp.), violated the First and Fourteenth Amendments of the United States Constitution. Relying on *Hicks* v. *Miranda*, 422 U. S. 332, 344 (1974), the Court of Appeals held that the claim was foreclosed by this Court's summary disposition of two appeals from the Supreme Judicial Court of Massachusetts in *Langone* v. *Connolly*, 460 U. S. 1057 (1983). See 746 F. 2d 97, 100–101 (CA1 1984).

In *Hicks*, the Court explained the precedential effect of the dismissal for "for want of [a] substantial federal question" in *Miller* v. *California*, 418 U. S. 915 (1974):

> "*[Miller]* was an appeal from a decision by a state court upholding a state statute against federal constitutional attack. A federal constitutional issue was properly presented, it was within our appellate jurisdiction under 28 U. S. C. § 1257(2), and we had no discretion to refuse adjudication of the case on its merits as would have been true had the case been brought here under our certiorari jurisdiction. We were not obligated to grant the case

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> plenary consideration, and we did not; but we were required to deal with its merits. We did so by concluding that the appeal should be dismissed because the constitutional challenge to the California statute was not a substantial one." 422 U. S., at 344–345.

Because the Court had jurisdiction over the appeal in *Miller*, the dismissal involved a rejection of "the specific challenges presented in the statement of jurisdiction." *Mandel* v. *Bradley*, 432 U. S. 173, 176 (1977) *(per curiam)*.

On the other hand, the order disposing of the appeals in *Langone* read:

> "Appeals from Sup. Jud. Ct. Mass. dismissed *for want of jurisdiction*. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari denied. Reported below: 388 Mass. 185, 446 N. E. 2d 43 [1983]." 460 U. S., at 1057 (emphasis added).

Because the Court dismissed the appeals for lack of appellate jurisdiction, we had no occasion to adjudicate the merits of the constitutional questions presented in the jurisdictional statements. Nor did the denial of certiorari have any precedential effect. See *Maryland* v. *Baltimore Radio, Inc.*, 338 U. S. 912, 919 (1950) (Opinion of Frankfurter, J., respecting denial of the petition for certiorari).

The judgment of the Court of Appeals is vacated to the extent it relied on the dismissal of the appeals in *Langone*, and the cause is remanded for further proceedings.

It is so ordered.